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9
10 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 FRANK LUCIDO, ALMACEO AND
12 LAURAE CAMPBELL, RICHARD
13 CARTER, REGGIE SMITH, DAVID
14 BALMER, KAREN PHILLIPS, WAYNE
15 COLELLO, KAREN BAKER, RICKY
16 BISHARAT, HOPE BENHAM, ROBIN
17 BENHAM, VIRGINIA BURGARDT,
18 CYNTHIA XENAKIS, DIANE PORTER,
19 LANCE CARLSON, GRACE
20 ARMSTRONG, JENNIFER HICKEY,
THOMAS AND SHARON NORMAND,
CHRISTINA WINTERS, ROBERT
BRYDEN, REGINA BOLLINGER, PAT
KELLY, AMERICA PENA, ELIZABETH
RODARTE, and KACY KIMBALL, on
behalf of themselves and all others similarly
situated,

21 Plaintiffs,

22 v.

23 NESTLÉ PURINA PETCARE COMPANY, a
24 Missouri corporation; and DOES1 through 200,
25 inclusive,

26 Defendants.
27

Case No. 3:15-cv-00569-EMC

**FIRST AMENDED CLASS
ACTION COMPLAINT**

CLASS ACTION

JURY TRIAL DEMAND

1 Plaintiffs identified below, individually and on behalf of the Classes defined below of
 2 similarly situated persons, file this First Amended Class Action Complaint against Defendant
 3 Nestlé Purina Petcare Company (“Purina”).

4 **I. NATURE OF THE CASE**

5 1. Purina failed to disclose that Beneful dog food contains Industrial Grade
 6 Glycols, which are not approved for use in food, mycotoxins, lead, and/or arsenic. Plaintiffs
 7 would not have purchased Beneful had they known Beneful contained any one of these
 8 substances. Plaintiffs bring this class action on behalf of all persons who purchased Beneful
 9 brand dog food, including persons who incurred out of pocket costs resulting from their dogs
 10 becoming ill or dying after ingesting Beneful.

11 **II. PARTIES**

12 2. Plaintiff Frank Lucido has at all material times been a resident of Discovery
 13 Bay, California. In late December 2014 or early January 2015, Plaintiff Lucido purchased a
 14 bag of Beneful for the first time. Between late December or early January 2015 and
 15 approximately January 15, 2015, Plaintiff Lucido’s dogs—Nella, a four-year old purebred
 16 German Shepherd sired by a champion show dog, and Remo, an eleven year-old Labrador—ate
 17 exclusively Beneful Healthy Fiesta and Healthy Weight . On approximately January 15, 2015,
 18 Plaintiff’s Lucido’s wife noticed that Nella, his healthy German Shepherd, was losing large
 19 amounts of hair and producing an unusual and unpleasant odor. Plaintiff Lucido became
 20 concerned about the possibility that Beneful was causing this. Shortly thereafter, on the night
 21 of January 17th, Nella became violently ill. Veterinary examination and testing revealed signs
 22 of internal bleeding in her stomach and liver malfunction consistent with poisoning, and Nella
 23 continues to have ongoing health problems. Remo, who lived in a different location from
 24 Nella, also became ill at almost the same time as Nella; he lost total mobility in his lower body,
 25 among other symptoms, before dying. Plaintiff Lucido would not have purchased Beneful had
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1 he known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a
2 result, Plaintiff Lucido has suffered substantial damages.

3 3. Plaintiffs Almaceo and Laurae Campbell have at all material times been
4 residents of Oakland, California. Plaintiffs Campbell owned Shaba Ranks, a six-year old
5 Rhodesian Ridgeback, who ate Purina Beneful Original for approximately four years. After
6 eating this product, Shaba Ranks experienced blood in the stool, diarrhea, internal bleeding,
7 kidney failure, lethargy, liver malfunction or failure, loss of appetite, seizures, vomiting, and
8 excessive thirst before dying on January 6, 2015. Plaintiffs Campbell would not have
9 purchased Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins,
10 Lead or Arsenic. As a result, the Campbells have suffered substantial damages.

11 4. Plaintiff Richard Carter has at all material times been a resident of Yuba City,
12 California. Plaintiff Carter owns Molly, a female Queensland Heeler, who is nine years old and
13 ate Beneful dog food for the three years prior to November 2014. Although Molly was
14 previously in good physical health, in November 2014, she fell ill, with unusually high amounts
15 of thirst, vomiting and bloody diarrhea. This illness resolved itself without veterinary
16 treatment. But in February 2015, Molly again fell ill, with the same symptoms as before, only
17 to a much more severe degree. Plaintiff Carter would not have purchased Beneful had he
18 known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
19 Plaintiff Carter has suffered substantial damages.

20 5. Plaintiff Reggie Smith has at all material times been a resident of Oceanside,
21 California. Plaintiff Smith owned Nadia, a five-year old Siberian Husky-Alaskan Malamute
22 Mix, who ate Purina Beneful Original or Purina Beneful Playful Life for approximately two
23 and one-half years. After eating these products, Nadia experienced diarrhea, internal bleeding,
24 kidney failure, lethargy, liver malfunction or failure, vomiting, and panicked breathing before
25 dying on March 2, 2015. Plaintiff Smith would not have purchased Beneful had he known
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1 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
2 Plaintiff Smith has suffered substantial damages.

3 6. Plaintiffs David Balmer and Karen Phillips have at all material times been
4 residents of Colorado. Plaintiffs Balmer and Phillips owned Scout, a six-year old Vizsla, who
5 ate Purina Beneful Original consistently starting in or about November 2014. After eating
6 Beneful for just a few months, in January 2015, Scout experienced decreased appetite, less
7 energy, and occasional episodes of vomiting. Plaintiffs Balmer and Phillips have two other
8 dogs. They did not eat Beneful and did not experience symptoms or otherwise become sick.
9 Starting on February 6, 2015, Scout's symptoms worsened. Over the next ten days, Scout had
10 several seizures, collapsed on several occasions, was lethargic weak, and sleepy, and
11 experienced vomiting, diarrhea with blood in the stool, and decreased appetite before he died in
12 Plaintiffs' arms on February 15, 2015. Plaintiffs Balmer and Phillips would not have purchased
13 Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
14 Arsenic. As a result, Plaintiffs Balmer and Phillips have suffered substantial damages.

15 7. Plaintiff Wayne Colello has at all material times been a resident of Kissimmee,
16 Florida. Plaintiff Colello owns Shiner, a three-year old Border Collie, who ate Beneful Healthy
17 Weight for six months to one year. After eating this product, Shiner experienced vomiting,
18 weakness, kidney failure, and liver failure starting December 21, 2014. Plaintiff Colello would
19 not have purchased Beneful had he known Beneful contained Industrial Grade Glycols,
20 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Colello has suffered substantial damages.

21 8. Plaintiff Karen Baker has at all material times been a resident of Springfield,
22 Illinois. Plaintiff Baker owns Chloe, a ten-month old German shepherd, who ate Purina
23 Beneful Puppy Chow & Healthy Growth for Puppies for the first ten months of her life.
24 Starting in March 2015, after eating these products, Chloe suffered liver damage. Plaintiff
25 Baker would not have purchased Beneful had she known Beneful contained Industrial Grade
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1 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Baker has suffered substantial
2 damages.

3 9. Plaintiff Ricky Bisharat has at all material times been a resident of
4 Bloomingdale, Illinois. Plaintiff Bisharat owns Tyson, a six-year old Pit Bull mix, who ate
5 Purina Beneful Original and Purina Beneful Healthy Radiance for four years. Starting in 2011,
6 and continuing during the four years in which Tyson ate these products, he experienced liver
7 malfunction or failure, loss of appetite, and vomiting, among other symptoms. Plaintiff
8 Bisharat would not have purchased Beneful had he known Beneful contained Industrial Grade
9 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Bisharat has suffered substantial
10 damages.

11 10. Plaintiff Hope Benham has at all material times been a resident of Versailles,
12 Indiana. Plaintiff Benham owns Willie, a five-year old Shih Tzu, who ate Purina Beneful
13 Healthy Fiesta and Purina Incredibites for one year. After eating these products, Willie
14 experienced blood in the stool, blood in the urine, diarrhea, kidney failure, lethargy, loss of
15 appetite, vomiting, and weight loss starting in December 2014. Willie has ceased eating
16 Beneful, but it is unclear whether he will ever fully recover from these symptoms. Plaintiff
17 Benham would not have purchased Beneful had she known Beneful contained Industrial Grade
18 Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Benham has suffered substantial
19 damages.

20 11. Plaintiff Robin Benham has at all material times been a resident of Versailles,
21 Indiana. Plaintiff Benham owned Sadie, a seven-year old Miniature Fox Terrier, who ate
22 Purina Beneful Original and Purina Healthy Growth for Puppies for four months. After eating
23 these products, Sadie experienced blood in the stool, blood in the urine, diarrhea, lethargy, liver
24 malfunction or failure, vomiting, and weight loss before dying in October 2013. Plaintiff
25 Benham would not have purchased Beneful had Plaintiff Benham known Beneful contained
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1 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Benham has
2 suffered substantial damages.

3 12. Plaintiff Virginia Burgardt has at all material times been a resident of Wichita,
4 Kansas. Plaintiff Burgardt owns Skye, a thirteen-month old Great Dane, who ate Purina
5 Beneful Original for four months. After eating this product, Skye experienced dehydration,
6 diarrhea, lethargy, and vomiting. Plaintiff Burgardt would not have purchased Beneful had she
7 known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
8 Plaintiff Burgardt has suffered substantial damages.

9 13. Plaintiff Cynthia Xenakis has at all material times been a resident of Wayland,
10 Massachusetts. Plaintiff Xenakis owned Piccolo, a seven-year old Maltese, who ate Beneful
11 Healthy Weight for approximately four months. After eating this product, Piccolo experienced
12 loss of appetite and liver damage beginning in January 2015. Plaintiff Xenakis would not have
13 purchased Beneful had she known Beneful contained Industrial Grade Glycols, Mycotoxins,
14 Lead or Arsenic. As a result, Plaintiff Xenakis has suffered substantial damages.

15 14. Plaintiff Diane Porter has at all material times been a resident of Mora,
16 Minnesota. Plaintiff Porter owns Oliver, a six-year old Pug, who ate Beneful Healthy Weight
17 for his entire life. After eating this product, Oliver experienced blood in the urine, among other
18 symptoms, beginning in July 2012, resulting in two extensive surgeries. Plaintiff Porter would
19 not have purchased Beneful had she known Beneful contained Industrial Grade Glycols,
20 Mycotoxins, Lead or Arsenic. Consequently, Plaintiff Porter has suffered substantial damages.

21 15. Plaintiff Lance Carlson has at all material times been a resident of Helena,
22 Montana. Plaintiff Carlson owned Hunter, a five-year old Dachshund, who ate Beneful
23 Healthy Weight for two months. After eating this product, Hunter experienced diarrhea, kidney
24 failure, liver failure, vomiting, and weight loss among other symptoms before dying on
25 February 2, 2015. Plaintiff Carlson would not have purchased Beneful had he known Beneful
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1 contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff
2 Carlson has suffered substantial damages.

3 16. Plaintiff Grace Armstrong has at all material times been a resident of Stratford,
4 New Jersey. Plaintiff Armstrong owns Rocky, a five-and-one-half-year old Beagle, who ate
5 Beneful Incredibites for three years. After eating this product, Rocky experienced blood in the
6 stool, dehydration, kidney failure, loose stool, and vomiting, starting October 12, 2014.
7 Plaintiff Armstrong would not have purchased Beneful had she known Beneful contained
8 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Armstrong has
9 suffered substantial damages.

10 17. Plaintiff Jennifer Hickey has at all material times been a resident of Queensbury,
11 New York. Plaintiff Hickey owns Dash, a seven-year old Dachshund, who ate Purina Beneful
12 Healthy Weight for one-and-one-half months. After eating this product, Dash experienced
13 kidney failure and lethargy, among other symptoms, before dying on February 11, 2015.
14 Plaintiff Hickey would not have purchased Beneful had she known Beneful contained
15 Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result, Plaintiff Hickey has
16 suffered substantial damages.

17 18. Plaintiffs Thomas and Sharon Normand have at all material times been residents
18 of Rochester, New York. Plaintiffs Normand owned Irie, an eleven-year old American
19 Staffordshire terrier, who ate Beneful Healthy Fiesta Dry dog food for approximately two
20 years. After eating this product, Irie experienced blood in the stool, weight loss, vomiting,
21 lethargy, and kidney failure before dying on August 7, 2013. Plaintiffs Normand would not
22 have purchased Beneful had they known Beneful contained Industrial Grade Glycols,
23 Mycotoxins, Lead or Arsenic. As a result, Plaintiffs Normand have suffered substantial
24 damages.

25 19. Plaintiff Christina Winters has at all material times been a resident of Newton
26 Falls, Ohio. Plaintiff Winters owned eight dogs: (1) Patti-Jo, an eight-year old Lhasa Apso, (2)
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1 Bailey, a thirteen-year-and-eleven-month old Lhasa Apso, (3) Charlotte, a thirteen-year old
 2 Lhasa Apso, (4) Toby, a thirteen-year old Lhasa Apso, (5) Jack, a ten-year old Lhasa Apso, (6)
 3 Benji, a ten-year old Lhasa Apso, (7) Phoebe, a fourteen-year-and-eleven-month old Maltese
 4 Yorkie, and (8) JJ, a ten-month old Shih Tzu. All of Plaintiff Winters' dogs ate Purina Beneful
 5 Healthy Weight and Healthy Radiance, except for JJ, who ate Purina Beneful Puppy. Plaintiff
 6 Winters' dogs began eating Beneful in December 2013. After eating these products, each dog
 7 became ill. After eating Beneful for almost two months, Patti-Jo experienced lethargy,
 8 vomiting, blood from her rectum, an extended stomach, and liver and kidney failure, before
 9 dying on January 28, 2014. Approximately six months later, the other dogs started getting sick.
 10 Phoebe experienced an extended stomach and liver and kidney failure before dying on
 11 December 22, 2014. Bailey experienced blindness, diarrhea, vomiting, and an extended
 12 stomach. Charlotte, Toby, Jack and Benji each experienced lethargy, diarrhea, and vomiting. JJ
 13 experienced vomiting. Plaintiff Winters would not have purchased Beneful had she known
 14 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
 15 Plaintiff Winters suffered substantial damages.

16 20. Plaintiff Robert Bryden has at all material times been a resident of Pittsburgh,
 17 Pennsylvania. Plaintiff Bryden owned Mason, a six-year old Doberman pinscher, who ate
 18 Purina Beneful Healthy Weight for six weeks. After eating this product, Mason experienced
 19 lethargy, loss of appetite, and weight loss, before dying in June 2013. Plaintiff Bryden would
 20 not have purchased Beneful had he known Beneful contained Industrial Grade Glycols,
 21 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Bryden suffered substantial damages.

22 21. Plaintiff Regina Bollinger has at all material times been a resident of Derry,
 23 Pennsylvania. Plaintiff Bollinger owned Josie, a seven-and-one-half-month old Collie
 24 Shepherd Mix, who ate Purina Beneful Healthy Growth for Puppies for her entire life. After
 25 eating this product, Josie experienced diarrhea, kidney failure, lethargy, loss of appetite, and
 26 vomiting before dying on February 10, 2015. Plaintiff Bollinger would not have purchased
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1 Beneful had she known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
2 Arsenic. As a result, Plaintiff Bollinger suffered substantial damages.

3 22. Plaintiff Pat Kelly has at all material times been a resident of Feasterville,
4 Pennsylvania. Plaintiff Kelly owned Apollo Creed, a six-month old Boxer, who ate Purina
5 Healthy Growth for Puppies for his entire life. After eating this product, Apollo Creed
6 experienced lethargy, loss of appetite, vomiting, weight loss, excessive thirst and kidney failure
7 before dying on February 21, 2015. Plaintiff Kelly would not have purchased Beneful had
8 Plaintiff Kelly known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
9 Arsenic. As a result, Plaintiff Kelly suffered substantial damages.

10 23. Plaintiff America Pena has at all material times been a resident of Pharr, Texas.
11 Plaintiff Pena owned Minnie, a seven-year old Great Dane, who ate Purina Beneful Healthy
12 Fiesta and Purina Beneful Original for four years. After eating these products, Minnie
13 experienced diarrhea, lethargy, loss of appetite, seizures, vomiting, weight loss, and liver
14 failure, among other symptoms, before dying in October 2012. Plaintiff Pena would not have
15 purchased Beneful had Plaintiff Pena known Beneful contained Industrial Grade Glycols,
16 Mycotoxins, Lead or Arsenic. As a result, Plaintiff Pena suffered substantial damages.

17 24. Plaintiff Elizabeth Rodarte has at all material times been a resident of San
18 Antonio, Texas. Plaintiff Rodarte owned T-Bone, a five-year old Mastiff, who ate Purina
19 Beneful Original for one year. After eating this product, T-Bone experienced internal bleeding,
20 lethargy, liver malfunction or failure, loss of appetite and weight loss before dying on
21 December 22, 2012. Plaintiff Rodarte would not have purchased Beneful had she known
22 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. As a result,
23 Plaintiff Rodarte suffered substantial damages.

24 25. Plaintiff Kacy Kimball has at all material times been a resident of Port Angeles,
25 Washington. Plaintiff Kimball owns Buffalo, a seven-year old Jack Russell Terrier, who ate
26 Beneful Healthy Weight and Beneful Original for his entire life. After eating these products,
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1 Buffalo experienced blood in the urine, jaundice, and liver malfunction or failure, among other
 2 symptoms, starting January 26, 2015. Plaintiff Kimball would not have purchased Beneful had
 3 Plaintiff Kimball known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead or
 4 Arsenic. As a result, Plaintiff Kimball suffered substantial damages.

5 26. Defendant Nestlé Purina (“Purina”) manufactures, distributes, markets, and sells
 6 pet foods, including Beneful. It is a Missouri corporation, with its principal place of business at
 7 Checkerboard Square, St. Louis, Missouri. It does business in California and throughout the
 8 United States. Purina has sold dog food since 1957, including Beneful since 2001. It has spent
 9 millions of dollars promoting trust and confidence among consumers in its pet food products.
 10 It holds itself out to the public as a manufacturer of safe, nutritious and high-quality pet food.
 11 Purina’s marketing and public relations efforts have been successful, such that reasonable
 12 consumers believe that Purina always makes and sells safe, nutritious and high-quality pet
 13 food.

14 **III. JURISDICTION AND VENUE**

15 27. This class action is within the original jurisdiction of this Court pursuant to 28
 16 U.S.C. § 1332(a) and 28 U.S.C. § 1332(d)(2) (the Class Action Fairness Act). The amount in
 17 controversy exceeds five million dollars (\$5,000,000), exclusive of interest and costs, and at
 18 least one member of the putative classes is a citizen of a state different than Purina.

19 28. Members of the proposed Class are citizens of California and the United States.
 20 Plaintiff is informed and believes that more than two-thirds of the proposed Class members are
 21 citizens of states different from the home state(s) of Nestlé Purina.

22 29. Venue in this District satisfies the requirements of 28 U.S.C. § 1391(b)(2)
 23 because a substantial amount of the events and occurrences giving rise to the claims occurred in
 24 this District or a substantial part of the property that is the subject of this action is situated in
 25 this District. Moreover, Purina intentionally avails itself of the markets within California
 26 through the promotion, sale, marketing, and distribution of its products, including Beneful, and
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has sufficient minimum contacts in California such that it is subject to personal jurisdiction here. Purina is deemed to reside in this District pursuant to 28 U.S.C. § 1391(c). Purina also committed a significant number of tortious acts that are the subject of this complaint in California, including within this District.

IV. FACTUAL ALLEGATIONS

A. The Products

30. Purina manufactures, markets, distributes, and sells dog food under the brand name “Beneful,” including various dry or “kibble” dog foods. This action concerns only the dry or kibble variety of foods sold under the Beneful name. These products include the following: Beneful Healthy Weight, Beneful Original, Beneful Incredibites, Beneful Healthy Growth For Puppies, Beneful Healthy Smile, Beneful Healthy Fiesta, Beneful Healthy Radiance, and Beneful Playful Life. These products are referred to collectively here as “Beneful.”

B. Purina’s Claims and Representations about Beneful

31. At all times material and throughout the relevant time period, Purina made and continues to make various positive material representations about the health benefits, quality, nutritional value, safety and other attributes of Beneful on the product packaging, on its website, and in various advertising media, including television, as illustrated by the following examples:

a) The Product Packaging and Labeling

- “100% Complete and Balanced Nutrition”
- “Satisfaction Guaranteed. If you’re not happy, we’re not happy. Complete satisfaction or your money back...”
- “23 Essential vitamins & minerals”

- “At Purina, we’re unconditionally devoted to pets. We’ve dedicated over 80 years to developing the high-quality products that satisfy the needs of dogs and cats.”
 - “Yes, dogs can have it all—and should! How? A special blend of wholesome ingredients, including grains, real beef, and accents of vitamin-rich veggies! It gives dogs the complete nutrition they need and a taste they love.” (Beneful Original)
 - “Made with wholesome rice, real chicken, soy, and accented with veggies and apples, it has the complete nutrition adult dogs need...” (Beneful Healthy Weight)
 - “With real chicken, wholesome rice, and accents of vitamin-rich veggies, it has the complete nutrition puppies need...” (Beneful Healthy Growth for Puppies”)
 - “When your puppy is grown, Beneful has so many delicious ways to help keep him healthy and happy.” (Beneful Healthy Growth for Puppies)
- b) The Website: <https://www.beneful.com/products/dry-dog-food> (last visited June 1, 2015).
- “It has the complete nutrition dogs need and the taste they love.” (all Beneful products);
 - “Our omega-rich, complete and balanced nutrition helps support a shiny coat and healthy skin.” (Beneful Healthy Radiance);
 - “Here’s to being healthy and happy! Yes, dogs can have it all—and should!” (Beneful Original);
 - “Our protein-rich blend, with real beef and egg, is made for a playful dog like yours!” (Beneful Playful Life);

- “Especially for puppies, our calcium-rich blend is made with the added goodness of real milk.” (Beneful Growth for Puppies);
- “Helps your dog maintain a healthy weight with our calorie-smart blend—with 10% fewer calories than Beneful® Original.” (Beneful Healthy Weight);
- “Our protein-rich blend, with real beef, is made with your little buddy in mind.” (Beneful IncrediBites);
- “Our vitamin-rich blend, with real chicken, helps support overall good health.” (Beneful Healthy Fiesta).

c) Television Advertising

- “Make your dog happy—choose Beneful.” (television ad)
- “Be Healthy. Healthful. Flavorful. Beneful.” (television ad)
- “Beneful keeps my dog healthy and happy.” (television ad)
- “Healthy with a side of happy.” (television ad)

C. Purina Failed to Disclose that Beneful Contains Harmful or Toxic Ingredients

32. Purina failed to disclose in the list of ingredients on its packaging, or otherwise, that Beneful contains **Industrial Grade Glycols**, which the FDA has not approved for use in foods and which should not be used in foods.

33. Purina also failed to disclose that Beneful contains **Mycotoxins**, a group of toxins produced by fungus that occurs in grains, which are a principal ingredient in Beneful. Independent consumer advocate group The Association for Truth In Pet Food conducted testing of Beneful Original and found that it contained dangerous levels of Mycotoxins.

(<http://associationfortruthinpetfood.com/wp-content/uploads/2015/01/PFTestInfoGraphic.jpg>) Mycotoxins are a known, significant health risk to dogs. Consumer complaints about Beneful report symptoms that are consistent with Mycotoxin poisoning.

(<http://news.cornell.edu/stories/2005/12/vet-college-caring-dogs-poisoned-contaminated-food>).

34. Purina further failed to disclose that Beneful contains **Lead**.

35. Purina further failed to disclose that Beneful contains **Arsenic**.

36. The presence of the **Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic**, whether alone or combined, are harmful or toxic to dogs.

37. Plaintiffs, members of the proposed Classes, and reasonable consumers would not have purchased Beneful had they known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic.

D. Complaints by Dog Owners About Beneful

38. Plaintiffs allege that, as a direct and proximate result of the consumption of Beneful, their dogs became ill or died. They are not alone. The Internet is replete with thousands of complaints from dog owners about Beneful and the adverse effects on their dogs from Beneful, including serious injury and death. The dogs show consistent symptoms, including stomach and related internal bleeding, liver malfunction or failure, vomiting, diarrhea, dehydration, weight loss, seizures, bloat, and kidney failure, as illustrated by the following:

- On May 16, 2015, a pet owner reported: “I have fed my Yellow Lab Beneful for a few years now. A few months ago my dog starting throwing up and having seizures. It happened twice. At the same time I started reading about the harm that Beneful has caused some dogs. I stopped using Beneful for about a month and everything was fine. Long story short, I still had the Beneful in a tub and by mistake fed it to my dog and the same day she had the same thing - throwing up and a seizure. This time made sure I threw out the Beneful. It just seems so hard to believe that it is just a coincidence.”
- On May 8, 2015, a pet owner reported: “I believe 2 of my dogs have died due to me feeding them Beneful not knowing it was harmful to them. They both had the symptoms described in the class action suit. My other 2 also have some symptoms but I stopped feeding them the food. One is holding steady for now and the other who is stronger, and younger is improving. My smallest dog became sick, first throwing up and eventually after the vets were unable to figure out and help, his stomach started internally bleeding and there was nothing they could do.

The next was my other boy and he started throwing up and died within the week because his kidneys were failing and it was awful. My oldest girl coughs all the time, she is on some medicine to try and help but it is gradually getting worse. The last girl

1 had severe itching which caused an infection which we have gotten cleared up and are
 2 hoping she doesn't come down with any more symptoms and is on the way to good
 health with no more Beneful food.”

- 3 • On May 7, 2015, a pet owner reported: “We started feeding our dogs Beneful in early
 4 2014. By July, our three year old, eight pound Yorkie began suffering from violent,
 5 severe seizures. We spent over \$1000 on vets, tears, anti anxiety meds and treatments.
 6 In February 2015 I heard reports that Beneful was making dogs sick. I immediately
 7 replaced our dog food with another, more "natural" brand and our dog's seizures have
 completely disappeared. After weekly (or more) seizures, there have been none since
 replacing her food. This is too much a coincidence for me to believe Purina's claims that
 this food is safe and healthy.”
- 8 • On April 26, 2015, a pet owner reported: “My dog who is 7 years old has eaten Beneful
 9 dog food most of his life. Three months ago he started to vomit. I changed him to
 10 chicken and rice for a few days thinking he had a tummy bug. I put him back on
 11 Beneful and again he vomited. I then decided to try the all natural recipe from a
 12 different brand. He was fine but didn't like it very much. Two months went and he was
 13 fine. Due to the fact that he didn't LOVE the new food and expense I went back to
 Beneful yesterday. Last night he vomited. There is something very wrong with this
 food. Now I will have to put him back on the expensive brand that he isn't crazy about
 because there is something in Beneful that is making my perfectly healthy dog, sick!”
- 14 • On January 31, 2015, a pet owner reported: “after eating Beneful for just over a week,
 15 my dogs liver failed. She was drinking way more than usual, stopped eating and was
 vomiting. She spent 2 days in intensive care with IV fluids and antibiotics.”
- 16 • On December 23, 2014, another pet owner reported: “we started using Beneful dog food
 17 for our 9-year old dog Roxie a few weeks ago. A few days later our dog started going to
 18 the bathroom all over our house. She also started drinking a lot more water than
 19 usual...brought her to the Vet for blood work and her liver functions were really
 high...Two days later our dog had passed away in our family room.”
- 20 • On October, 19, 2014, another pet owner reported: “My dog Daisy started getting bad
 21 sick after my vet recommended Purina Beneful dog food. She's vomiting, very weak,
 22 dehydrated, lethargic, couldn't walk. She's always been a happy playful yorkie. We
 been to vet, spend 300 dollars on her.”
- 23 • “Dog (8 years old) getting surgery on 10/20/2014. Vet said it was bladder stones, large
 24 ones. Asked us what type of dog food we use. Beneful. He said that makes sense, a lot
 of dogs come in with this condition, always Beneful.” - published October 17, 2014.
- 25 • “My 1 1/2 year old dog has been suffering with vomiting, diarrhea, lethargic and no
 26 desire to eat for the last three weeks. We've been back and forth to the vet and vet
 27 hospital many times. I've spent over \$6,000 on overnight stays and exploratory
 surgery...My dog had been home for four days and all he was eating was chicken,

cheerios, yogurt and pumpkin. Last night he ate beneful and today we are back to square one...This food should not be on the market!!" Published October 2, 2014.

- "I rescued a very healthy pug three years ago. About two and a half years ago I had a coupon for Beneful. My dog got very sick stopped eating was weak and had loose diarrhea...Three months later my wonderful dog was dead. I sent the UPC to Beneful. They reimbursed me for the vet bills that were about \$700.00." Published September 21, 2014.
- "We ran out of dog food one day and my husband brought home a bag of Beneful Healthy Fiesta...My 5 year old shar pei ate half a bowl and the next morning was kinda mopey looking. I came home from work that night and he was throwing up bile everywhere. We tried giving him water and he wouldn't even drink. The next morning I found my dog dead. Up until the day this food was given to him, he was a lively and happy dog. I attribute his death to this horrible dog food that is still being sold. After reading all of the complaints on this dog food, Purina should be ashamed and made to take this brand off of the shelves." Published September 20, 2014.
- "...I bought a bag of Beneful from Walmart. I weened my dog into it using the remainder of her science diet. As soon as she started eating the Beneful on its own, she would throw it up. Every night for a week I would be woken up by her puking. On Sunday I switched her back to the regular science diet (not sensitive) but she wouldn't eat it so I tried giving her Beneful and she wouldn't eat that...We're talking about a dog who LOVES her some boiled chicken. Anyway after 3 days of her not eating anything except grass and barely drinking any water I took her to the vet. They took her temperature rectally and when they pulled out the thermometer there was blood. After lab work was done and came back clear, they did some feeling around and found her lower intestine to be swollen. She has never had issues like this before..." Posted September 4, 2014.
- "After opening a new bag of Playful Life by Beneful my dog was horribly sick. He was vomiting, diarrhea, lethargic, wheezing and couldn't walk or eat. We rushed him to the vet where he was put on steroids, IV to re-hydrate and antibiotics. He almost died. He was there for four days...This past Monday we started him back on Beneful (the same bag). He was worse than before in just hours. We got him to the hospital and the vet got him on an IV and flushed his system. He was sure it was this Lot of food." Posted August 7, 2014.

E. Purina Has Been Paying Injured Consumers for their Silence

39. Purina has been contacting dog owners soon after they post anything on social media, including Beneful's Facebook page and Facebook discussion groups focused on the dangers of Beneful. Purina denies liability and offers monetary compensation in exchange for

1 confidentiality agreements. Purina's tactics have been downright persistent and aggressive,
2 consisting of repeated calls and frequent voicemails.

3 40. Purina's settlement offers have ranged from the purchase price of a bag of the
4 food up to a few thousand dollars. In exchange, Purina requires consumers to enter into a
5 nondisclosure agreement ("NDA"). Several consumers have reported on social media that the
6 NDA is remarkably restrictive, prohibiting a public disclosure. Below is an example of an
7 NDA Purina sought from a dog owner:

8 Claim No. [REDACTED]

9 **SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS**

10 IN CONSIDERATION of the payment of [REDACTED],
11 receipt of which is hereby acknowledged by [REDACTED] residing at [REDACTED],
12 [REDACTED] (there in after the undersigned"), for my/our self(ves) spouse(s),
13 children, agents, heirs, representatives, executors, predecessors, successors and assigns,
14 release and forever discharge Nestlé Purina PetCare Company and its shareholders,
15 subsidiaries, affiliates, divisions, officers, directors, employees, agents, representatives,
16 insurers, predecessors, successors and assigns and all other persons, firms, companies, and
17 corporations and/or independent contractors (including, but not limited to, all distributors,
18 handlers, brokers, prepared food purveyors, wholesale sellers, retail sellers, grocery stores
19 and/or chains and all other such parties charged or chargeable with responsibility), of and from
20 any and all claims, demands, debts, damages, actions or causes of action, injuries, loss of use,
21 loss of services, veterinary and or medical expenses or any other liabilities arising out of or in
22 any way connected with the incident that was reported on or about 04/19/2015, involving
23 product: Beneful Dry Dog Food.

24 The undersigned further covenant(s) and agree(s) to protect, indemnify, and hold
25 harmless Nestlé Purina PetCare Company and its shareholders, subsidiaries, affiliates, officers,
26 directors, employees, agents, representatives, insurers, predecessors, successors and assigns,
27 and/or independent contractors of and from any further loss, damage or expense by reason of
litigation or otherwise arising out of or in any way connected with the subject claim.

The undersigned understands that this settlement is a compromise of a disputed claim,
the liability for which is expressly denied and that this settlement is not to be construed as an
admission of liability on the part of any persons, corporations, companies, divisions or other
entities released herein.

The undersigned agree that this release expresses a FULL, FINAL AND COMPLETE
SETTLEMENT of the liability claimed as well as AN ACCORD AND SATISFACTION. It is also agreed
that this release reflects the ENTIRE AGREEMENT between the parties hereto and that the
terms of this release are contractual and not a mere recital, consideration therefore having
been given and accepted.

I/WE AGREE THAT THIS RELEASE CONSTITUTES A CONFIDENTIAL SETTLEMENT OF THIS ENTIRE
MATTER, BARRING ALL PARTIES FROM PUBLIC DISCLOSURE OF ANY DETAILS, DISCUSSIONS,
SOCIAL MEDIA POSTINGS, ETC., WHATSOEVER, REGARDING IT.

This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this
release are contractual and not a mere recital.

I/We further state that we have carefully read the foregoing release and know the contents
thereof, and I/we sign the same as our own free act.

Date: _____ By: _____
[REDACTED]

V. CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this action on behalf of themselves and all others similarly situated, as members of the Classes and Subclasses proposed below, under Federal Rule of Civil Procedure 23. The requirements of subsections (a), (b)(2), and (3) to Rule 23 are met with respect to the Classes defined below.

42. Plaintiffs seek to represent, and bring this action on behalf of, the following Classes:

a) **California**: Plaintiffs Frank Lucido, Almaceo Campbell, Richard Carter and Reggie Smith (collectively, “California Plaintiffs”) are members and proposed class representatives of the following California Class and Subclass.

i. **California Class**: All persons residing in California who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

ii. **California Subclass**: All persons residing in California who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, and/or internal organ failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins four years prior to February 5, 2015 to class certification.

b) **Colorado**: Plaintiffs David Balmer and Karen Phillips (“Colorado Plaintiffs”) are members and putative class representatives of the Colorado Class Subclass.

i. **Colorado Class**: All persons residing in Colorado who purchased Beneful for personal, family or household use at

any time during the period that begins three years prior to February 5, 2015 to the date of class certification.

- ii. Colorado Subclass: All persons residing in Colorado who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins three years prior to February 5, 2015 to class certification.

c) **Florida**: Plaintiff Wayne Colello (“Florida Plaintiff”) is a member and putative class representative of the Florida Class and Subclass.

- i. Florida Class: All persons residing in Florida who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

- ii. Florida Subclass: All persons residing in Florida who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins four years prior to February 5, 2015 to class certification.

d) **Illinois**: Plaintiffs Karen Baker and Ricky Bisharat (collectively, “Illinois Plaintiffs”) are members and putative class representatives of the Illinois Class and Subclass.

i. Illinois Class: All persons residing in Illinois who purchased Beneful for personal, family or household use at any time during the period that begins five years prior to February 5, 2015 to the date of class certification.

ii. Illinois Subclass: All persons residing in Illinois who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins five years prior to February 5, 2015 to class certification.

e) Indiana: Plaintiffs Robin Benham and Hope Benham (collectively, “Indiana Plaintiffs”) are members and putative class representatives of the Indiana Class and Subclass.

i. Indiana Class: All persons residing in Indiana who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

ii. Indiana Subclass: All persons residing in Indiana who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins four years prior to February 5, 2015 to class certification.

1 f) **Kansas:** Plaintiff Virginia Burgardt (“Kansas Plaintiff”) is a member
2 and putative class representative of the Kansas Class and Subclass.

3 i. **Kansas Class:** All persons residing in Kansas who purchased
4 Beneful for personal, family or household use at any time
5 during the period that begins five years prior to February 5,
6 2015 to the date of class certification.

7 ii. **Kansas Subclass:** All persons residing in Kansas who
8 purchased Beneful for personal, family or household use and
9 who incurred out of pocket costs resulting from internal organ
10 distress, injury, failure, or death resulting from these
11 conditions, after their dog ingested Beneful at any time during
12 the period that begins five years prior to February 5, 2015 to
13 class certification.

14 g) **Massachusetts:** Plaintiff Cynthia Xenakis (“Massachusetts Plaintiff”) is
15 a member and putative class representative of the Massachusetts Class
16 and Subclass.

17 i. **Massachusetts Class:** All persons residing in Massachusetts
18 who purchased Beneful for personal, family or household use
19 at any time during the period that begins four years prior to
20 February 5, 2015 to the date of class certification.

21 ii. **Massachusetts Subclass:** All persons residing in
22 Massachusetts who purchased Beneful for personal, family or
23 household use and who incurred out of pocket costs resulting
24 from internal organ distress, injury, failure, or death resulting
25 from these conditions, after their dog ingested Beneful at any
26
27

time during the period that begins four years prior to February 5, 2015 to class certification.

h) **Minnesota:** Plaintiff Diane Porter (“Minnesota Plaintiff”) is a member and putative class representative of the Minnesota Class and Subclass.

i. **Minnesota Class:** All persons residing in Minnesota who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.

ii. **Minnesota Subclass:** All persons residing in Minnesota who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins six years prior to February 5, 2015 to class certification.

i) **Montana:** Plaintiff Lance Carlson (“Montana Plaintiff”) is a member and putative class representative of the Montana Class and Subclass.

i. **Montana Class:** All persons residing in Montana who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

ii. **Montana Subclass:** All persons residing in Montana who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during

the period that begins four years prior to February 5, 2015 to class certification.

j) **New Jersey:** Plaintiff Grace Armstrong (“New Jersey Plaintiff”) is a member and putative class representative of the New Jersey Class and Subclass.

i. **New Jersey Class:** All persons residing in New Jersey who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.

ii. **New Jersey Subclass:** All persons residing in New Jersey who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins six years prior to February 5, 2015 to class certification.

k) **New York:** Plaintiffs Jennifer Hickey and Thomas and Sharon Normand (“New York Plaintiffs”) are members and putative class representatives of the New York Class and Subclass.

i. **New York Class:** All persons residing in New York who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.

ii. **New York Subclass:** All persons residing in New York who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ

distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins six years prior to February 5, 2015 to class certification.

1) **Ohio:** Plaintiff Christina Winters (“Ohio Plaintiff”) is a member and putative class representative of the Ohio Class and Subclass.

i. **Ohio Class:** All persons residing in Ohio who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.

ii. **Ohio Subclass:** All persons residing in Ohio who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins six years prior to February 5, 2015 to class certification.

m) **Pennsylvania:** Plaintiffs Robert Bryden, Regina Bollinger, and Pat Kelly (“Pennsylvania Plaintiffs”) are members and putative class representatives of the Pennsylvania Class and Subclass.

i. **Pennsylvania Class:** All persons residing in Pennsylvania who purchased Beneful for personal, family or household use at any time during the period that begins six years prior to February 5, 2015 to the date of class certification.

ii. **Pennsylvania Subclass:** All persons residing in Pennsylvania who purchased Beneful for personal, family or household use

and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins six years prior to February 5, 2015 to class certification.

n) **Texas:** Plaintiffs America Pena and Elizabeth Rodarte (“Texas Plaintiffs”) are members and putative class representatives of the Texas Class and Subclass.

i. **Texas Class:** All persons residing in Texas who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

ii. **Texas Subclass:** All persons residing in Texas who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins four years prior to February 5, 2015 to class certification.

o) **Washington:** Plaintiff Kacy Kimball (“Washington Plaintiff”) is a member and putative class representative of the Washington Class and Subclass.

i. **Washington Class:** All persons residing in Washington who purchased Beneful for personal, family or household use at any time during the period that begins four years prior to February 5, 2015 to the date of class certification.

ii. Washington Subclass: All persons residing in Washington who purchased Beneful for personal, family or household use and who incurred out of pocket costs resulting from internal organ distress, injury, failure, or death resulting from these conditions, after their dog ingested Beneful at any time during the period that begins four years prior to February 5, 2015 to class certification..

43. The above proposed Classes exclude: (1) Purina, any entity in which Purina has a controlling interest, and their legal representatives, officers, directors, employees, assigns, and successors; (2) all Judges and Justices to whom this case is ever assigned and all member of their staffs and immediate families; and (3) Class Counsel.

44. Plaintiffs are informed and believe that Purina sold many hundreds of thousands of packages of Beneful which contain substances that are harmful or toxic to dogs. While the precise number and identities of the members of the Classes are unknown to Plaintiffs, this information can be ascertained through reasonable discovery, diligence and appropriate notice. Give Purina's sales volumes, Plaintiffs are informed and believe that there will be tens of thousands of Class members in each State Class and hundreds of thousands of Class members in several of the State Classes.

45. There are numerous common questions of law and fact that predominate over any questions affecting only individual members of the Classes. Among these common questions of law and fact are the following:

- a) Whether the Beneful products contain ingredients that are harmful or toxic to dogs;
- b) Whether Purina made representations, including on the packaging and labels, regarding the safety and quality of Beneful;

- c) Whether the representations Purina made regarding the safety and quality of Beneful were true;
- d) Whether Purina knew or should have known that Beneful contained substances that are harmful or toxic to dogs;
- e) Whether Purina failed to disclose that Beneful contained substances that are harmful or toxic to dogs;
- f) Whether Plaintiffs' and Class members' dogs became ill or died as a result of having consumed Beneful;
- g) Whether, by its misconduct as set forth here, Purina has engaged in unlawful, unfair, deceptive, or fraudulent business practices;
- h) Whether Purina breached an express warranty;
- i) Whether Purina breached an implied warranty of merchantability;
- j) Whether Purina violated its statutory consumer protection obligations;
- k) Whether Plaintiffs and members of the Classes have suffered damages as a result of the conduct alleged here, and if so, the measure of such damage;
- l) Whether Purina has been unjustly enriched as a result of the conduct complained of here; and
- m) Whether Plaintiffs and Class members are entitled to equitable relief, including but not limited to restitution or disgorgement of all Purina's gross revenues from the sale of Beneful.

46. The claims of the Plaintiffs are typical of the claims of the members of the Classes. They all arise out of the same pattern of conduct by Purina and under the same legal theories, and Purina has no defenses unique to Plaintiffs or to any individual Plaintiff.

1 47. Plaintiffs have no interests antagonistic to those of the Classes and will protect
2 the interests of the Classes fairly and adequately. Plaintiffs have retained attorneys experienced
3 in complex class action litigation.

4 48. The questions of fact and law common to all Class and Subclass members
5 predominate over any questions affecting only individual Class and Subclass members. Purina
6 is alleged to have engaged in the same misconduct with respect to all Class and Subclass
7 members, including, among other things, falsely, deceptively and misleadingly labeling and
8 advertising Beneful and failing to disclose the presence of hazardous and toxic ingredients in
9 Beneful; all Class and Subclass members suffered the same injury caused by Purina's
10 misconduct, i.e., paying money to purchase a falsely advertised product (the Classes) and
11 suffering damage to their personal property (their dogs) as a result of purchasing Beneful and
12 feeding it to their dogs (the Subclasses); all Class and Subclass members would not have
13 purchased Beneful had they known it contained the contaminants and toxins described herein;
14 and all Subclass members suffered similar consequential damages in that Beneful caused their
15 dogs to become ill and/or die.

16 49. A class action is superior to any other available means for the fair and efficient
17 adjudication of this controversy, and no unusual difficulties are likely to be encountered in the
18 management of this class action. The damages or other financial detriment suffered by
19 Plaintiffs and the other Class and Subclass members are relatively small compared to the
20 burden and expense that would be required to individually litigate their claims against Purina,
21 so it would be impracticable for Class members to individually seek redress for Purina's
22 wrongful conduct. Even if the Class members could afford individual litigation, the court
23 system could not. Individualized litigation creates a potential for inconsistent or contradictory
24 judgments, and increases the delay and expense to all parties and the court system. By contrast,
25 the class action device presents far fewer management difficulties, and provides the benefits of
26 single adjudication, economies of scale, and comprehensive supervision by a single court.
27

1 50. Purina has acted or refused to act on grounds generally applicable to Plaintiffs
 2 and the other members of the Classes and Subclasses, thereby making appropriate final
 3 injunctive relief and declaratory relief with respect to the members of the Classes and
 4 Subclasses as a whole. The misconduct alleged herein on the part of Purina is continuing as of
 5 the present time: Purina has not stopped the false, deceptive and misleading labeling and
 6 advertising of Beneful, but continues to insist that Beneful is healthy and safe for dogs; Purina
 7 has not removed the hazardous and toxic ingredients from Beneful; and dogs are continuing to
 8 get sick and die from eating Beneful. Injunctive relief is necessary in order to force Purina to
 9 cease engaging in these unlawful practices and take corrective action.

10 51. Plaintiffs do not anticipate any difficulty in the management of this litigation.

11 **VI. TOLLING AND ESTOPPEL**

12 52. Plaintiffs' causes of action did not arise until Plaintiffs discovered, or by the
 13 exercise of reasonable diligence should have discovered, that they were injured by Purina's
 14 wrongful conduct as alleged here. Because Purina concealed and failed to disclose to Plaintiffs
 15 and members of the Classes and the Subclasses the dangers of feeding Beneful to their dogs,
 16 and because Purina affirmatively warranted and misrepresented that Beneful constituted safe,
 17 healthy food for dogs, Plaintiffs did not and could not have discovered the defect through
 18 reasonable diligence until shortly before the filing of the Complaint in this case. The applicable
 19 statutes of limitations have been tolled by Purina's knowing and active concealment of the
 20 material facts concerning the dangers of feeding Beneful to their dogs and by Purina's
 21 affirmative warranties and representations that Beneful constituted safe, healthy food for dogs.
 22 Purina kept Plaintiffs and the members of the Classes and the Subclasses ignorant of vital
 23 information essential to pursue their claims, without any fault or lack of diligence on the part of
 24 Plaintiffs and Class members.

25 53. Purina was and is under a continuous duty to disclose to Plaintiffs and the
 26 members of the Classes and the Subclasses the true character, quality and nature of Beneful. At
 27

1 all relevant times, and continuing to this day, Purina knowingly, affirmatively and actively
 2 misrepresented and concealed the true character, quality and nature of Beneful, including that it
 3 was dangerous for dogs, rather than a safe, healthy food for dogs, as promised. Therefore,
 4 Purina is estopped from relying on any statutes of limitation in defense of this action

5 54. Pursuant to the doctrines of Equitable Tolling, Equitable Estoppel, and
 6 Fraudulent Concealment, the claims asserted herein are not barred due to any statute of
 7 limitations or statute of repose. With respect to each and every claim for relief asserted here,
 8 Plaintiffs expressly plead Equitable Tolling, Equitable Estoppel, and Fraudulent Concealment
 9 and its application to that claim for relief.

10 55. Purina knew or should have known that Beneful was not a safe, healthy food for
 11 dogs, despite advertisements, marketing and representations promising that Beneful constitutes
 12 “healthy,” “great nutrition” for dogs, which promotes “healthy growth.”

13 56. Purina knew or should have known that Beneful contains substances known to
 14 be dangerous to dogs, including Industrial Grade Glycols, Mycotoxins, Lead and/or Arsenic.

15 57. All conditions precedent to the filing of this First Amended Complaint have
 16 been satisfied.

17 **VII. CAUSES OF ACTION**

18 **A. CALIFORNIA CAUSES OF ACTION**

19 **COUNT 1**

20 **Asserted as to the California Plaintiffs, the California Class and the California Subclass 21 (Negligence)**

22 58. The California Plaintiffs incorporate here the allegations of all of the preceding
 23 and subsequent paragraphs as if fully set forth here verbatim.

24 59. The California Plaintiffs bring this claim on behalf of themselves, the California
 25 Class and the California Subclass.
 26
 27

60. Purina owed a duty of reasonable care to the California Plaintiffs and the members of the California Class and the California Subclass to provide dog food that was safe for consumption by dogs, free from excessive amounts of toxins with harmful effects.

61. Purina breached this duty by selling Beneful, which contained Industrial Grade Glycols, Mycotoxins, Arsenic, or Lead, without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of Beneful; and without adequately warning the California Plaintiffs and the members of the California Class and the California Subclass of Beneful's dangers on its packaging.

62. Such conduct by Purina was negligent because it did not reflect the level of care that an ordinarily prudent and reasonable person in Purina's place would have given under the same or similar circumstances.

63. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the California Plaintiffs and the members of the California Class and the California Subclass, would not recognize the risk; and that consumption of Beneful by pets would foreseeably result in their injury and death. Such injury and death to the dogs constituted property damage to the California Plaintiffs and the members of the California Class and the California Subclass beyond and in addition to their damage from purchasing Beneful.

64. As a proximate result of Purina's negligent acts, the California Plaintiffs and the members of the California Class and the California Subclass suffered injury to property, specifically the illness and deaths of their dogs, and the expenses incurred for them.

COUNT 2

**Asserted as to the California Plaintiffs, the California Class and the California Subclass
(Negligent Misrepresentation)**

65. The California Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1 value appropriate for its intended purpose. Beneful was further defective due to inadequate
 2 testing. Purina knew that Beneful would be purchased and used without inspection or testing
 3 for defects and harmful substances by the purchaser.

4 76. Further, Beneful was under the exclusive control of Purina and was sold in its
 5 defective state without warning as to its health risks. Purina had a duty to warn purchasers of
 6 the health risks posed by Beneful in an effective manner. Such warnings should have been
 7 placed on the packaging at point-of-sale or in another manner reasonably calculated to fairly
 8 warn purchasers of the danger.

9 77. The kinds of harm which befell the California Plaintiffs, the California Class
 10 and the California Subclass and their pets were foreseeable results of the defects in Beneful.

11 78. Neither the California Plaintiffs nor any member of the California Class or the
 12 California Subclass had any reason to know, prior to or at the time of purchase, or any time
 13 prior to the injuries to their pets, that Beneful was defective and harmful.

14 79. The California Plaintiffs and members of the California Class and California
 15 Subclass have been damaged as a result of the defects in design and manufacture of Beneful,
 16 and as a result of Purina's failure to warn of its health risks, in an amount to be proven at trial.

17 **COUNT 4**

18 **Asserted as to the California Plaintiffs, the California Class and the California Subclass** 19 **(Violation of the Consumers Legal Remedies Act (Cal. Civ. Code § 1750, *et seq.*))**

20 80. The California Plaintiffs incorporate herein the allegations of all of the
 21 preceding and subsequent paragraphs as if fully set forth here verbatim.

22 81. The California Plaintiffs bring this claim on behalf of themselves, the California
 23 Class and the California Subclass.

24 82. Purina's sale of dangerous and defective pet food constitutes an unlawful,
 25 deceptive and unfair business act within the meaning of the Consumers Legal Remedies Act,
 26 California Civil Code section 1750, *et seq.*

27 83. Purina is a "person" as defined under California Civil Code section 1761(c).

1 84. Purina violated Civil Code sections 1770(a)(5) and (a)(7) when it failed to
 2 disclose that Beneful contains Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.
 3 Purina's sale of hazardous pet food has the capacity to deceive a substantial portion of the
 4 public and to affect the public interest.

5 85. As a result of the practices described here, Purina has committed the following
 6 violations of section 1770:

- 7 b) Purina has represented that Beneful has characteristics or benefits that it
 8 does not have, including that it is "healthy" and offers "great nutrition"
 9 and omitted to disclose that it contains Industrial Grade Glycols,
 10 Mycotoxins, Arsenic or Lead (section 1770(a)(5)); and
- 11 c) Purina has falsely represented that Beneful is of a particular standard,
 12 quality, or grade (section 1770(a)(7)).

13 86. Purina undertook its deceptive practices with the design and purpose of inducing
 14 the California Plaintiffs and members of the California Class and the California Subclass to
 15 purchase Beneful, which they did. Purina engaged in marketing efforts to reach the California
 16 Plaintiffs and members of the California Class and the California Subclass and persuade
 17 members to purchase Beneful, which was defective, leading to the injuries to their pets and
 18 other damages.

19 87. As a result of Purina's unfair and deceptive acts and practices, the California
 20 Plaintiffs and members of the California Class and the California Subclass have suffered
 21 damages including: (1) the difference in value between the Beneful as warranted (the full
 22 purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not
 23 have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins,
 24 Arsenic, or Lead); (2) the veterinarian bills caused by consumption of Beneful; (3) for those
 25 whose pets died from eating Beneful, the market value of the dogs; and (4) for those whose
 26 dogs died from eating Beneful, the cost of disposing of the remains.

1 96. Purina engaged in unfair, deceptive, untrue or misleading advertising by
 2 representing that Beneful was “healthy,” constituted “great nutrition,” and that it promoted
 3 “healthy growth” and that Purina guaranteed satisfaction, despite the fact that Beneful was not
 4 safe for consumption by dogs and Purina did not guarantee satisfaction, and by omitting to
 5 disclose that Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.

6 97. Purina committed unfair, unlawful or fraudulent practices by: (a) representing
 7 that Beneful was safe for dogs to consume when it was not; and (b) continuing to represent the
 8 health benefits of Beneful despite being aware of numerous complaints from users of Beneful
 9 that their dogs had become ill or died after consuming it; and (c) omitting to disclose that
 10 Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic or Lead.

11 98. The California Plaintiffs and members of the California Class and the California
 12 Subclass relied on such statements and omissions. Had they known that Beneful contained
 13 Industrial Grade Glycols, Mycotoxins, Arsenic or Lead, they never would have purchased it.

14 99. Accordingly, Plaintiffs seek an injunction requiring Purina to cease selling
 15 Beneful and to recall any of the product currently in distribution, restitution, and all other relief
 16 this Court deems appropriate.

17 **COUNT 6**

18 **Asserted as to the California Plaintiffs, the California Class and the California Subclass**
 19 **(Violation of the False Advertising Law (Cal. Bus. & Prof. Code §17500 et seq.))**

20 100. The California Plaintiffs reallege all prior allegations as though fully set forth
 21 herein.

22 101. The California Plaintiffs bring this claim on behalf of themselves, the California
 23 Class and the California Subclass.

24 102. Purina disseminated advertising within California and throughout the United
 25 States. Purina disseminated or caused to be disseminated the materially untrue and misleading
 26 advertising described in this First Amended Complaint with the intent to directly or indirectly
 27

1 induce the California Plaintiffs and the members of the California Class and the California
2 Subclass to purchase Beneful.

3 103. The advertising misrepresenting Beneful's health benefits, and omitting to state
4 that Beneful contained Industrial Grade Glycols, Mycotoxins, Arsenic, or Lead, were untrue,
5 misleading, and deceptive, as set forth in this First Amended Complaint.

6 104. When Purina disseminated the advertising described here, it knew, or by the
7 exercise of reasonable care should have known, that the statements concerning Beneful were
8 untrue or misleading, or omitted to state the truth about Beneful, in violation of the False
9 Advertising Law, Cal. Bus. & Prof. Code §17500, *et seq.*

10 105. The California Plaintiffs, on their own behalf and on behalf of the California
11 Class and the California Subclass, seek restitution, disgorgement, injunctive relief, and all other
12 relief allowable under §17500, *et seq.*

13 **B. COLORADO CAUSES OF ACTION**

14 **COUNT 7**

15 **Asserted as to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass** 16 **(Breach of Express Warranty)**

17 106. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
18 paragraph as though fully set forth at length herein.

19 107. The Colorado Plaintiffs bring this action on behalf of themselves, the Colorado
20 Class and the Colorado Subclass.

21 108. Purina constitutes a "merchant" and a "seller" in connection with its sales of
22 Beneful, as those terms are defined in the Colorado Uniform Commercial Code. Further, the
23 Colorado Plaintiffs, the Colorado Class members and the Colorado Subclass members
24 constitute "buyers" in connection with their purchases of Beneful from Purina, as that term is
25 defined in the Colorado Uniform Commercial Code. Further, Beneful constitutes "goods," as
26 that term is defined in the Colorado Uniform Commercial Code.
27

1 109. By affirmations of fact, promises and descriptions made on Beneful's packaging
2 and which relate to such goods, Purina provided the Colorado Plaintiffs and the members of the
3 Colorado Class and the Colorado Subclass with written express warranties before or at the time
4 of purchase, including the following:

5 a) "Satisfaction Guaranteed. If you're not happy, we're not happy.
6 Complete satisfaction or your money back...."

7 b) "At Purina, we're unconditionally devoted to pets. We've dedicated
8 over 80 years to developing the high-quality products that satisfy the needs of dogs and cats."

9 c) "100% Complete and Balanced Nutrition"

10 d) "Made with wholesome rice, real chicken, soy, and accented with
11 veggies and apples, it has the complete nutrition adult dogs need...."

12 e) "Healthy."

13
14 110. These affirmations of facts and promises made by Purina to the Colorado
15 Plaintiffs and the members of the Colorado Class and the Colorado Subclass related to Beneful
16 and became part of the bases of the bargains between them and Purina and thereby created
17 express warranties that Beneful would conform to those affirmations and promises.

18 Furthermore, the aforementioned descriptions of Beneful were part of the bases of the bargains
19 for the purchases of Beneful between Purina and the Colorado Plaintiffs and the members of
20 the Colorado Class and the Colorado Subclass and they created an express warranty that the
21 goods would conform to those descriptions. As previously noted, because Beneful contained
22 Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic, it did not conform to the affirmations,
23 promises and descriptions previously mentioned, resulting in breaches of express warranties.

24 111. Beneful was marketed directly to consumers by Purina, came in sealed
25 packages, and did not change from the time it left Purina's possession until it was purchased by
26 consumers in stores.
27

1 112. The Colorado Plaintiffs have complied with all conditions precedent to filing
2 this breach of warranty claim, including providing timely notice of these breaches of warranty
3 to Purina on behalf of themselves and the Colorado Class within a reasonable time after
4 discovering that Beneful might have proximately caused the damages described herein. Such
5 notice was reasonable based on the circumstances of this case, including the fact Purina has
6 engaged in a campaign to prevent other affected consumers from publicly discussing similar
7 claims while at the same time expressly denying any relationship between the failure to
8 disclose that Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic, and
9 the injuries here at issue. Alternatively, this pleading constitutes adequate notice on behalf of
10 the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass.
11 Alternatively, notice need not have been given to Purina because it had actual notice of its
12 breaches of warranty as to the Colorado Plaintiffs and the members of the Colorado Class and
13 the Colorado Subclass.

14 113. As a proximate result of Purina's breach of express warranties, the Colorado
15 Plaintiffs and the members of the Colorado Class and the Colorado Subclass have suffered
16 actual damages as follows: (a) the difference in value between the value of the Beneful as
17 expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted
18 and delivered (\$0, because consumers would not have paid anything for it had they known it
19 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); i.e., the full purchase price
20 of the Beneful; (b) the veterinarian bills incurred as a result of consumption of Beneful; (c) the
21 market value of the dogs killed by consumption of Beneful; and (d) the cost of disposing of the
22 remains of the dogs killed by consumption of Beneful. The Colorado Plaintiffs and members
23 of the Colorado Class and the Colorado Subclass cannot return Beneful to Purina for repair as
24 the subject defect is irreparable.
25
26
27

COUNT 8**Asserted as to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass
(Breach of the Implied Warranty of Merchantability, Colo. Rev. Stat. § 4-2-314)**

114. The Colorado Plaintiffs incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

115. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass, as those terms are defined in the Colorado Uniform Commercial Code. Further, the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass constituted “buyers” as that term is defined in the Colorado Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Colorado Uniform Commercial Code.

116. As part of the sales to the Colorado Plaintiffs and members of the Colorado Class and the Colorado Subclass, Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled, and conform to the promises or affirmations of fact made on the containers or labels.

117. Beneful breached the implied warranty of merchantability initially because it would not pass without objection in the trade under the contract description. Specifically, Beneful will not pass without objection in the trade under the description of dog food, because it contained Industrial Grade Glycols, Mycotoxins, Lead or Arsenic. In addition, Purina breached the implied warranty as to Beneful, because Beneful was not fit for the ordinary purpose for which it is used, which is safely feeding dogs. Further, Purina breached the implied warranty of merchantability because Beneful was not adequately contained, packaged or labeled because it failed to warn of the dangers of its consumption by dogs.

118. At the time of sale to the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass throughout the Class Period, Purina made promises and affirmations of fact on the packaging of Beneful to the effect that Beneful was safe for

1 consumption by pets. Said representations included, but were not limited to, Beneful being
2 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
3 satisfaction would be guaranteed.

4 119. However, Purina breached the implied warranty of merchantability because
5 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
6 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
7 customers’ satisfaction was not guaranteed. For the reasons set forth above, Beneful was
8 defective, such defect was present when Beneful left Purina’s control, and such defect caused
9 the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass
10 members’ injuries.

11 120. Within a reasonable time after the discovery of Purina’s breach of the implied
12 warranty and the possible link of Beneful to the illness and death of their pet, the Colorado
13 Plaintiffs gave notice of such breaches on behalf of themselves and members of the Colorado
14 Class and the Colorado Subclass. Alternatively, this pleading constitutes adequate notice on
15 behalf of the Colorado Plaintiff and the members of the Colorado Class and the Colorado
16 Subclass. Alternatively, no notice was required because Purina was already aware of its
17 breaches as to the Colorado Plaintiffs and the members of the Colorado Class and the Colorado
18 Subclass.

19 121. As a proximate result of this breach of implied warranty by Purina, the Colorado
20 Plaintiffs and the Colorado Class have been damaged in the following manner: (a) by the
21 difference in value between the value of the Beneful as warranted (the full purchase price) and
22 the value of the Beneful as actually delivered (\$0, because consumers would not have paid
23 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
24 Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c) for those whose pets
25 died from eating Beneful, the market value of the dogs; and (d) for those whose dogs died from
26 eating Beneful, the cost of disposing of the remains.
27

COUNT 9**Asserted as to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. ("MMWA"))**

122. The Colorado Plaintiffs incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

123. The Colorado Plaintiffs bring this claim on behalf of themselves, the Colorado Class and the Colorado Subclass.

124. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the "MMWA").

125. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

126. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

127. The Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass are "consumers" as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

128. Pursuant to 15 U.S.C. § 2310(e), the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass are entitled to bring this action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Colorado Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Colorado Plaintiffs already gave any required notice on behalf of themselves and the members of the Colorado Class and the Colorado Subclass by letter dated April 28, 2015.

129. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged and labeled, and (d) conformed to the promises and affirmations of fact set forth on its container and label.

1 130. Purina is liable to the Colorado Plaintiffs and the members of the Colorado
2 Class and the Colorado Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the
3 implied warranty of merchantability.

4 131. Purina initially breached the implied warranty of merchantability as to the
5 Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass because
6 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
7 Specifically, Beneful was unsafe and toxic to dogs and defective because it contained Industrial
8 Grade Glycols, Mycotoxins, Lead, or Arsenic. These substances in Beneful made it unfit for its
9 ordinary purpose of providing safe, healthy dog food. In fact, Beneful has caused injury and
10 death to thousands of dogs.

11 132. Purina further breached its implied warranty of merchantability to the Colorado
12 Plaintiffs and the members of the Colorado Class and the Colorado Subclass because Beneful
13 would not pass without objection in the trade under its contract description as dog food, as it
14 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
15 Lead, or Arsenic.

16 133. Purina further breached its implied warranty of merchantability to the Colorado
17 Plaintiffs and the members of the Colorado Class and the Colorado Subclass because Beneful
18 was not adequately contained, packaged, and labeled. The directions and labeling that
19 accompanied the Beneful dog food did not warn the Colorado Plaintiffs and the members of the
20 Colorado Class and the Colorado Subclass of the dangers of feeding Beneful to their dogs.

21 134. Purina further breached its implied warranty of merchantability to the Colorado
22 Plaintiffs and the members of the Colorado Class and the Colorado Subclass because Beneful
23 did not conform to the promises and affirmations of fact set forth on its container and label, as
24 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
25 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
26 satisfaction was not guaranteed.
27

135. Pursuant to 15 U.S.C. § 2310(d)(1), the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass are entitled to recover the following damages proximately caused to them by Purina's breach of the implied warranty of merchantability: (1) the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful, the cost of disposing of the remains.

136. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass in connection with the commencement and prosecution of this action.

COUNT 10
Asserted Against Purina on Behalf of the Colorado Plaintiffs and the Colorado Subclass
(Negligence)

137. The Colorado Plaintiffs incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

138. The Colorado Plaintiffs bring this claim on behalf of themselves, the Colorado Class and the Colorado Subclass.

139. Purina owed a duty of care to the Colorado Plaintiffs and the members of the Colorado Class and the Colorado Subclass to provide pet food that was safe for consumption by dogs, free from toxins that could have harmful effects if consumed.

140. Purina breached this duty by selling Beneful, which was not safe and contained harmful toxins, without adequate quality control and testing; without using proper

1 manufacturing and production practices; without properly investigating reports of pet deaths
2 and illnesses following consumption of Beneful; and without adequately warning the Colorado
3 Plaintiffs and the members of the Colorado Class and the Colorado Subclass of such dangers on
4 Beneful's packaging. Such conduct by Purina was negligent in that Purina failed to act as an
5 ordinarily prudent and reasonable person would have acted under the same or similar
6 circumstances.

7 141. Purina should have known that Beneful posed a risk of harm to dogs; that
8 purchasers of Beneful, including the Colorado Plaintiffs and the members of the Colorado
9 Class and the Colorado Subclass, would not recognize the risk; and that consumption of
10 Beneful by dogs would foreseeably result in injury and death to those dogs, constituting
11 property damage to the Colorado Plaintiffs and the members of the Colorado Class and the
12 Colorado Subclass beyond and in addition to their damages from purchasing the worthless
13 Beneful.

14 142. As a proximate result of Purina's negligent acts alleged herein, the Colorado
15 Plaintiffs and the members of the Colorado Class and the Colorado Subclass suffered injury to
16 property, specifically in the illness and deaths of their dogs and the expenses incurred
17 therewith.

18 **COUNT 11**
19 **Asserted as to the Colorado Plaintiffs and the Colorado Subclass**
20 **(Strict Products Liability)**

21 143. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
22 paragraph as though fully set forth at length herein.

23 144. The Colorado Plaintiffs bring this claim on behalf of themselves, the Colorado
24 Class and the Colorado Subclass.

25 145. Purina designed, manufactured, distributed and sold Beneful, which was unsafe
26 because it contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead and had other
27 harmful effects.

1 146. The existence of Industrial Grade Glycol, Mycotoxins, Arsenic or Lead and
 2 other harmful effects in Beneful was, at all times material hereto, an unreasonably dangerous
 3 defect and/or condition. The failure of Purina to warn on its package of the dangerousness of
 4 Beneful also constituted an unreasonably dangerous defect and/or condition.

5 147. These unreasonably dangerous defects and/or conditions existed at the time
 6 Beneful left Purina's control.

7 148. Beneful came in sealed packages, and both the product and its packaging did not
 8 change from the time it left Purina's possession through the time it arrived in stores to be sold
 9 to consumers and consumers purchased and took possession of it.

10 149. The unreasonably dangerous defects and/or conditions of Beneful proximately
 11 caused injury and death to dogs, constituting property damage to the Colorado Plaintiffs and
 12 the members of the Colorado Class and the Colorado Subclass beyond and in addition to their
 13 damages from purchasing the worthless Beneful.

14 150. Accordingly, Purina is strictly liable for the damages caused to the Colorado
 15 Plaintiffs and the members of the Colorado Class and the Colorado Subclass by the
 16 consumption of the unreasonably dangerous Beneful, specifically the illness and deaths of their
 17 dogs and the expenses incurred therewith.

18 **COUNT 12**

19 **Asserted as to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass** 20 **(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

21 151. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
 22 paragraph as though fully set forth at length herein.

23 152. The Colorado Plaintiffs bring this claim on behalf of themselves, the Colorado
 24 Class and the Colorado Subclass.

25 153. This claim in quasi-contract is based upon principles of restitution. A person
 26 who has been unjustly enriched at the expense of another is required to make restitution to the
 27 other.

1 154. The Colorado Plaintiffs and the members of the Colorado Class and the
2 Colorado Subclass conferred a benefit on Purina by purchasing Beneful in the form of the gross
3 revenues Purina derived from such sales, which they would not have conferred had the true
4 facts detailed above been disclosed by Purina.

5 155. At the expense of the Colorado Plaintiffs and members of the Colorado Class
6 and the Colorado Subclass, Purina received and accepted benefits in the form of the gross
7 revenues Purina derived from sales of Beneful to the Colorado Plaintiffs and the members of
8 the Colorado Class and the Colorado Subclass.

9 156. For the reasons detailed above, Purina has profited and accepted such benefits
10 under circumstances where it engaged in improper, deceitful or misleading conduct that would
11 make it inequitable and unjust for Purina to retain such benefit without repaying the value it
12 received from the sales of such products.

13 157. The Colorado Plaintiffs and the members of the Colorado Class and the
14 Colorado Subclass are entitled to restitution of the entire amount Purina received from Purina's
15 sales of Beneful to them.

COUNT 13

Asserted as to the Colorado Plaintiffs, the Colorado Class and the Colorado Subclass (Violation of the Colorado Consumer Protection Act, Colo.Rev.Stat. § 6-1-105, et seq.)

16 158. The Colorado Plaintiffs incorporate by reference each preceding and succeeding
17 paragraph as though fully set forth at length herein.
18

19 159. The Colorado Plaintiffs bring this claim on behalf of themselves, the Colorado
20 Class and the Colorado Subclass.
21

22 160. The Colorado Plaintiffs and the members of the Colorado Class and the
23 Colorado Subclass were actual purchasers and users of Beneful manufactured, marketed,
24 distributed and sold by Purina.

25 161. As set forth in detail above, Purina disseminated unhealthy and dangerous
26 Beneful despite making numerous uniform material representations about its allegedly
27 guaranteed and healthy nature, and it omitted material facts to the contrary, including that

1 Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic. In so doing, Purina
 2 engaged in and/or caused others to engage in a deceptive trade practice. In violation of the
 3 following provisions of Colo.Rev.Stat. § 6-1-105, Purina:

4 “(b) Knowingly makes a false representation as to the source, sponsorship,
 5 approval or certification of goods

6 “(e) Knowingly makes a false representation as to the characteristics,
 7 ingredients, uses [or] benefits ... of goods ... or a false representation as to the
 8 sponsorship, approval, status, affiliation, or connection of a person therewith;

9 “(g) Represents that goods ... are of a particular standard, quality, or grade,
 10 or that goods are of a particular style or model, if he knows or should know that
 11 they are of another;

12 “(i) Advertises goods ... with intent not to sell them as advertised;

13 “(r) Advertises or otherwise represents that goods or services are guaranteed
 14 without clearly and conspicuously disclosing the nature and extent of the
 15 guarantee, any material conditions or limitations in the guarantee which are
 16 imposed by the guarantor, the manner in which the guarantor will perform, and
 17 the identity of such guarantor....

18 “(u) Fails to disclose material information concerning goods ... which
 19 information was known at the time of an advertisement or sale if such failure to
 20 disclose such information was intended to induce the consumer to enter into a
 21 transaction”.

22 162. These deceptive trade practices occurred in the course of Purina’s business.

23 163. These deceptive trade practices significantly impacted the public as there are
 24 thousands of actual or potentially affected purchasers and users of Beneful in Colorado, and
 25 Beneful was disseminated in part from Colorado throughout the United States.
 26
 27

164. As a result of these deceptive trade practices, the Colorado Plaintiffs and members of the Colorado Class and the Colorado Subclass were injured and suffered actual damages or losses, which include (a) the difference in value between the value of the Beneful as expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the Beneful; (b) the veterinarian bills incurred as a result of consumption of Beneful; (c) the market value of the dogs killed by consumption of Beneful; and (d) the cost of disposing of the remains of the dogs killed by consumption of Beneful.

C. FLORIDA CAUSES OF ACTION

COUNT 14

Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq.

165. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

166. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class and the Florida Subclass.

167. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

168. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

169. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

170. The Florida Plaintiff and the members of the Florida Class and the Florida Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

171. Pursuant to 15 U.S.C. § 2310(e), the Florida Plaintiff and the members of the Florida Class and the Florida Subclass are entitled to bring this class action and are not required

1 to give Purina notice and an opportunity to cure until such time as the Court determines the
2 representative capacity of the Florida Plaintiff pursuant to Rule 23 of the Federal Rules of Civil
3 Procedure. However, Florida Plaintiff Wayne Colello already gave the required notice on
4 behalf of himself, the Florida Class and the Florida Subclass by letter dated June 3, 2015.

5 172. In connection with its sale of Beneful, Purina gave an implied warranty as
6 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
7 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
8 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
9 contract description as dog food, (c) was adequately contained, packaged and labeled as the
10 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
11 container and label. Fla. Stat. § 672.314.

12 173. Purina is liable to the Florida Plaintiff and members of the Florida Class and the
13 Florida Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty
14 of merchantability.

15 174. Purina initially breached the implied warranty of merchantability as to the
16 Florida Plaintiff and members of the Florida Class and the Florida Subclass because Beneful
17 was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
18 Specifically, Beneful contained Industrial Grade Glycols, which have not been approved for
19 use in food, Mycotoxins, Lead, or Arsenic, making Beneful unfit for its ordinary purpose of
20 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
21 dogs.

22 175. Purina further breached its implied warranty of merchantability to the Florida
23 Plaintiff and the members of the Florida Class and the Florida Subclass because Beneful would
24 not pass without objection in the trade under its contract description as dog food, as it contained
25 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
26 Arsenic.
27

1 176. Purina further breached its implied warranty of merchantability to the Florida
2 Plaintiff and members of the Florida Class and the Florida Subclass because Beneful was not
3 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
4 Beneful dog food did not warn the Florida Plaintiff and members of the Florida Class and the
5 Florida Subclass that Beneful contained Industrial Grade Glycols, which have not been
6 approved for use in food, Mycotoxins, Lead, or Arsenic.

7 177. Purina finally breached its implied warranty of merchantability to the Florida
8 Plaintiff and the members of the Florida Class and the Florida Subclass because Beneful did
9 not conform to the promises and affirmations of fact set forth on its container and label, as
10 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
11 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
12 satisfaction was not guaranteed.

13 178. Pursuant to 15 U.S.C. § 2310(d)(1), the Florida Plaintiff and the members of the
14 Florida Class and the Florida Subclass are entitled to recover the following damages
15 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
16 the difference in value between the Beneful as warranted (the full purchase price) and the
17 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
18 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
19 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
20 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
21 the cost of disposing of the remains.

22 179. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Florida Plaintiff and the
23 members of the Florida Class and the Florida Subclass are entitled to recover a sum equal to the
24 aggregate amount of costs and expenses (including attorneys’ fees based on actual time
25 expended) determined by the Court to have been reasonably incurred by the Florida Plaintiff
26
27

1 and the members of the Florida Class and the Florida Subclass in connection with the
2 commencement and prosecution of this action.

3 **COUNT 15**

4 **Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass**
5 **Breach of Express Warranty - Fla. Stat. § 672.313**

6 180. The Florida Plaintiff incorporates herein the allegations of all of the preceding
7 and subsequent paragraphs as if fully set forth here verbatim.

8 181. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class
9 and the Florida Subclass.

10 182. Purina constituted both a “merchant” and a “seller,” as those terms are defined
11 in Fla. Stat. §§ 672.103 and 672.104, in connection with its sale of Beneful to the Florida
12 Plaintiff and the members of the Florida Class and the Florida Subclass. Further, the Florida
13 Plaintiff and the members of the Florida Class and the Florida Subclass constituted “buyers,” as
14 that term is defined in Fla. Stat. § 672.103. Beneful, itself, constituted “goods,” as that term is
15 defined in Fla. Stat. § 672.105.

16 183. The representations on Purina’s packaging for Beneful created express
17 warranties, including that Beneful was safe for consumption by pets, under both common law
18 and Fla. Stat. § 672.313. Said representations include, but are not limited to, Beneful dog food
19 being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that
20 customers’ satisfaction would be guaranteed.

21 184. The representations regarding Beneful described in detail above constituted
22 affirmations of fact and promises relating to Beneful that became part of the basis for the
23 bargain for the purchase of Beneful and created an express warranty that Beneful would
24 conform to those affirmations of fact and promises.

25 185. Likewise, the representations as described in detail above constituted
26 descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful
27 and created an express warranty that Beneful would conform to those descriptions.

186. Beneful contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

187. The Florida Plaintiff and the members of the Florida Class and the Florida Subclass were injured as a proximate result of Purina's aforementioned breaches as follows: (a) in the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they know it contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from consuming Beneful, the market value of those dogs; and (d) for those whose dogs died from consuming Beneful, the cost of disposing of their remains.

188. Within a reasonable time after their discovery of Purina's breaches, the Florida Plaintiff gave notice of the breaches of the express warranties on behalf of himself and the members of the Florida Class and the Florida Subclass. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not necessary for the Florida Plaintiff or members of the Florida Class or the Florida Subclass to give Purina notice of its breaches of the express warranties because Purina had actual notice of the fact that Beneful contained excessive amounts of substances which made it toxic and deadly to dogs.

COUNT 16

Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass Breach of the Implied Warranty of Merchantability—Fla. Stat. § 672.314

189. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

190. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class and the Florida Subclass.

191. Purina is a "seller" and "merchant" as to Beneful within the meaning of Fla. Stat. § 672.104. Purina designed, manufactured and sold Beneful, which constitutes "goods"

1 within the meaning of Fla. Stat. § 672.105. The Florida Plaintiff and members of the Florida
2 Class and the Florida Subclass constituted “buyers” within the meaning of Fla. Stat. § 672.103.
3 Consequently, pursuant to Florida law Purina impliedly warranted that Beneful was
4 merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food,
5 (b) could pass without objection in the trade under its contract description as dog food, (c) was
6 adequately contained, packaged, and labeled as the agreements required, and (d) conformed to
7 the promises and affirmations of fact set forth on its container and labels.

8 192. Beneful was sold in sealed packaging, and the defects existed when it left
9 Purina’s control.

10 193. When Purina designed, manufactured and sold Beneful, it knew the purpose for
11 which Beneful was intended; *i.e.*, that it would be consumed by dogs.

12 194. Purina initially breached the implied warranty of merchantability as to the
13 Florida Plaintiff and the members of the Florida Class and the Florida Subclass because
14 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
15 Specifically, Beneful contained Industrial Grade Glycols, which have not been approved for
16 use in food, Mycotoxins, Lead, or Arsenic, making it unfit for its ordinary purpose of providing
17 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

18 195. Purina further breached its implied warranty of merchantability to the Florida
19 Plaintiff and the members of the Florida Class and the Florida Subclass because Beneful would
20 not pass without objection in the trade under its contract description as dog food, as it contained
21 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
22 Arsenic.

23 196. Purina further breached its implied warranty of merchantability to the Florida
24 Plaintiff and the members of the Florida Class and the Florida Subclass because Beneful was
25 not adequately contained, packaged, and labeled. The directions and labeling that accompanied
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1 Beneful did not warn the Florida Plaintiff and the members of the Florida Class and the Florida
2 Subclass of the dangers of feeding Beneful to their dogs.

3 197. Purina finally breached its implied warranty of merchantability to the Florida
4 Plaintiff and the members of the Florida Class and the Florida Subclass because Beneful did
5 not conform to the promises and affirmations of fact set forth on its container and label, as
6 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
7 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
8 satisfaction was not guaranteed.

9 198. The Florida Plaintiff and members of the Florida Class and the Florida Subclass
10 were injured as a proximate result of Purina’s aforementioned breaches as follows: (a) in the
11 amount of the difference in value between the value of the Beneful as warranted (its full
12 purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have
13 paid anything for it had they know it contained Industrial Grade Glycols, Mycotoxins, Lead, or
14 Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c) for
15 those whose dogs died from consuming Beneful, the market value of those dogs; (d) for those
16 whose dogs died from consuming Beneful, the cost of disposing of their remains; and (e) other
17 economic losses including the increased risk of health problems in their pets.

18 199. Within a reasonable time after their discovery of Purina’s breaches, the Florida
19 Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of
20 themselves and members of the Florida Class and the Florida Subclass. Alternatively, this
21 pleading constitutes a sufficient notice of Purina’s breaches of the implied warranty of
22 merchantability. Alternatively, it was not necessary for the Florida Plaintiff or members of the
23 Florida Class and the Florida Subclass to give Purina notice of its breaches of the implied
24 warranty of merchantability because Purina had actual notice of the fact that the Beneful
25 contained excessive amounts of substances which made it toxic and deadly to dogs.
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COUNT 17**Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass
Violation of Florida's Deceptive and Unfair Trade Practices Act, Ch. 501, Part II**

200. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

201. The Florida Plaintiff brings this claim on behalf of himself and the Florida Class and the Florida Subclass.

202. The Florida Plaintiff and the members of the Florida Class and the Florida Subclass are "consumers" as defined in Fla. Stat. § 501.201.

203. The stated purpose of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") is to "protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. Ann. § 501.202(2).

204. The Florida Plaintiff and the members of the Florida Class and the Florida Subclass are consumers, and Beneful is considered a good, within the meaning of the FDUTPA. Purina is engaged in trade or commerce within the meaning of the FDUTPA.

205. Fla. Stat. § 501.204(1) declares unlawful "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce."

206. Purina has violated the FDUTPA by engaging in the unfair and deceptive practices, including its omission that Beneful contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, which offend public policies and are immoral, unethical, unscrupulous, and substantially injurious to consumers.

207. Fla. Stat. § 501.203(3) provides that a: "[v]iolation of this part" means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2013:

1 ... (c) Any law, statute, rule, regulation, or ordinance which
2 proscribes unfair methods of competition, or unfair, deceptive, or
 unconscionable acts or practices.

3 208. Florida laws provide protection to purchasers of animal food from unfair,
4 deceptive and unconscionable practices in Fla. Stat. § 580.071 (Adulteration) and Fla. Stat. §
5 580.081 (Misbranding).

6 209. Specifically, § 580.071 provides that “[n]o person shall distribute an adulterated
7 commercial feed or feedstuff.” A commercial feed or feedstuff shall be deemed to be
8 adulterated under (1)(a) if “it bears or contains any poisonous, deleterious, or nonnutritive
9 substance that may render it injurious to animal or human health, or (b) If it bears or contains
10 any food additive or added poisonous, deleterious, or nonnutritive substance that is unsafe
11 within the meaning of s. 406 of the Federal Food, Drug, and Cosmetic Act, other than a
12 pesticide chemical in or on a raw agricultural commodity”; or “(5) if its composition or quality
13 falls below or differs from that which it is purported or is represented to possess by its
14 labeling”. Fla. Stat. § 580.071 (2013).

15 210. Purina omitted to disclose that Beneful contained Industrial Grade Glycols,
16 which have not been approved for use in food, Mycotoxins, Lead, or Arsenic. Therefore, the
17 composition or quality of Beneful falls below what is purported or represented by its label.
18 Purina’s omissions injured the Florida Plaintiffs and the members of the Florida Class.
19 Moreover, these substances injured the dogs of the Florida Plaintiff and the members of the
20 Florida Subclass.

21 211. Fla. Stat. § 580.081 (Misbranding) provides that “[n]o person shall distribute
22 misbranded commercial feed or feedstuff.”

23 212. Commercial feed or feedstuff shall be deemed to be misbranded under
24 subsection (1) if “its labeling is false or misleading in any particular or under subsection (6) if it
25 is not appropriate for its intended or purported use.” Fla. Stat. § 580.081.
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213. Purina's conduct, as more fully described herein, violated Fla. Stat. § 580.071 and § 580.081. Violations of these laws, which are designed to protect consumers like Plaintiffs, constitute per se violations of FDUTPA pursuant to Fla. Stat. § 501.203(3)(c).

214. Under Fla. Stat. § 501.211(1), the Florida Plaintiff and members of the Florida Class and the Florida Subclass seek a declaratory judgment and court order enjoining the above described wrongful acts and practices of Purina and for restitution and disgorgement of the gross revenues derived by Purina from its sale of Beneful to them, along with any other equitable relief to which they are entitled, pursuant to Florida law.

215. Under Fla. Stat. §§ 501.211(2) and 501.2105, the Florida Plaintiff and the members of the Florida Class and the Florida Subclass make additional claims for damages, attorneys' fees, and costs.

216. Purina's violations of FDUTPA were the producing cause of actual economic damages to the Florida Plaintiff and members of the Florida Class and the Florida Subclass equal to: (a) the amount they paid for Beneful; the difference in value between the value of Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known Beneful contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) their veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from consuming Beneful, the market value of their dogs; and (4) for those whose dogs died from consuming Beneful, the cost of disposing of their remains, which they seek to recover from Purina pursuant to the FDUTPA.

COUNT 18
Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass
Negligence

217. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1 218. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class
2 and the Florida Subclass.

3 219. Purina owed a duty of reasonable care to the Florida Plaintiff and the members
4 of the Florida Class and the Florida Subclass to provide dog food that was safe for consumption
5 by dogs, free from excessive amounts of toxins with harmful effects.

6 220. Purina breached this duty by selling Beneful, which contained Industrial Grade
7 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, without
8 adequate quality control and testing; without using proper manufacturing and production
9 practices; without properly investigating reports of pet deaths and illnesses following
10 consumption of Beneful; and without adequately warning the Florida Plaintiff and the members
11 of the Florida Class and the Florida Subclass of Beneful's dangers on its packaging.

12 221. Such conduct by Purina was negligent because it did not reflect the level of care
13 that an ordinarily prudent and reasonable person in Purina's place would have given under the
14 same or similar circumstances.

15 222. Purina should have known that Beneful posed a risk of harm to dogs; that
16 purchasers of Beneful, including the Florida Plaintiff and the members of the Florida Class and
17 the Florida Subclass, would not recognize the risk, and that consumption of Beneful by pets
18 would foreseeably result in their injury and death. Such injury and death to the dogs
19 constituted property damage to the Florida Plaintiff and the members of the Florida Class and
20 the Florida Subclass beyond and in addition to their damage from purchasing Beneful.

21 223. As a proximate result of Purina's negligent acts alleged herein, the Florida
22 Plaintiff and the members of the Florida Class and the Florida Subclass suffered injury to
23 property, specifically the illness and deaths of their dogs, and the expenses incurred therewith.
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COUNT 19**Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass
Strict Products Liability – § 402A of the Restatement (2d) of Torts**

224. The Florida Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

225. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class and the Florida Subclass.

226. Purina designed, manufactured and sold Beneful, which contained excessive amounts of toxins and had other harmful effects as alleged, *supra*. The presence of excessive amounts of toxins and other harmful effects in Beneful, at all times material hereto, which would not reasonably have been expected by consumers, constituted an unreasonably dangerous defect and/or condition.

227. Beneful was unreasonably dangerous because of defects in marketing, design and manufacturing, which reasonable consumers would not have expected.

228. There was a defect in the marketing of Beneful which made it unreasonably dangerous because Purina failed to warn the Florida Plaintiff and members of the Florida Class and the Florida Subclass, on its packaging or otherwise, of the potential harm to their dogs from eating Beneful, which warning reasonable consumers would have expected.

229. Beneful was defectively designed because it contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, there were substitute ingredients available for Beneful that would meet the same needs and not be unsafe or unreasonably expensive, Purina had the ability to eliminate the unsafe character of Beneful without seriously impairing its usefulness or significantly increasing its costs, it was not anticipated that purchasers of Beneful would be aware of the dangers inherent in the use of the product, and the expectations of the ordinary consumer were that dog food manufactured by Purina would be safe for dogs.

230. Alternatively, Beneful was defectively manufactured because it contained excessive amounts of toxins or other ingredients that are harmful and deadly to dogs that

1 deviated in terms of quality from the specifications or planned output in a manner that rendered
2 it unreasonably dangerous and not within the expectations of reasonable consumers.

3 231. These unreasonably dangerous defects in the marketing, design and manufacture
4 of Beneful existed at the time the Beneful left Purina's control.

5 232. Beneful came in sealed packages, and it did not change from the time it left
6 Purina's possession, through the time it arrived in stores to be sold to consumers and consumers
7 bought and took possession of it.

8 233. The unreasonably dangerous defects and/or conditions of Beneful proximately
9 caused injury and death to dogs, and related expenses, constituting property damage to the
10 Florida Plaintiff and members of the Florida Class and the Florida Subclass beyond and in
11 addition to their damages from purchasing Beneful.

12 234. Accordingly, Purina is strictly liable for these damages caused to the Florida
13 Plaintiff and the members of the Florida Class and the Florida Subclass by its unreasonably
14 dangerous product.

15 **COUNT 20**
16 **Asserted as to the Florida Plaintiff, the Florida Class and the Florida Subclass**
17 **Unjust Enrichment**

18 235. The Florida Plaintiff incorporates herein the allegations of all of the preceding
19 and subsequent paragraphs as if fully set forth here verbatim.

20 236. The Florida Plaintiff brings this claim on behalf of himself, the Florida Class
21 and the Florida Subclass.

22 237. The Florida Plaintiff and members of the Florida Class and the Florida Subclass
23 purchased Beneful, which was defective, not merchantable, and unreasonably dangerous and
24 therefore had no value to them.

25 238. The Florida Plaintiff and members of the Florida Class and the Florida Subclass
26 purchased Beneful designed, manufactured and marketed by Purina in various retail stores.
27 Purina has received and retained a benefit from the Florida Plaintiff and the members of the
Florida Class and the Florida Subclass – the gross revenues resulting from their purchases.

Purina is not entitled to retain these revenues because of the diminished value, inherent defects, adulterated state, misbranded content and general lack of merchantability of Beneful.

239. The Florida Plaintiff and members of the Florida Class and the Florida Subclass lack an adequate remedy at law.

240. Principles of fairness and equity demand that Purina disgorge the above-referenced revenues to the Florida Plaintiff and the members of the Florida Class and the Florida Subclass.

D. ILLINOIS CAUSES OF ACTION

COUNT 21

Asserted Against Purina on Behalf of the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass

(Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act)

241. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

242. The Illinois Plaintiffs bring this action on behalf of themselves the Illinois Class and the Illinois Subclass.

243. This cause of action is brought pursuant the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.* (“ICFA”).

244. The acts and omissions, specifically including Purina’s omission that Beneful contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, occurred in the conduct of trade or commerce as that term is used therein.

245. Section 2 of ICFA prohibits unfair or deceptive acts or practices used or employed in the conduct of any trade or commerce, as well as deceptive acts or practices which are committed in the course of trade or commerce and with the intent that others rely upon them. 815 ILCS 505/2.

246. Section 2 of the ICFA provides, in full:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of

any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."

815 ILCS 505/2.

247. Purina's acts, representations and omissions, as alleged in detail *supra*, are by their very nature unfair, deceptive and unlawful within the meaning of the ICFA.

248. Purina has disseminated or caused to be disseminated advertising, labeling, packaging, marketing, and promotion of Beneful that is deceptive and otherwise violates the ICFA, because at all times material hereto, the advertising, labeling, packaging, marketing and promotion of Beneful included false and/or misleading statements or representations concerning the quality of Beneful and/or failed to disclose and/or concealed or omitted material facts, including without limitation, known defects and risks concerning the quality of Beneful, the healthiness of Beneful, that Beneful contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, and the safety of Beneful.

249. In making and disseminating the representations and omissions alleged herein, Purina intended to deceive reasonable consumers, including the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass.

250. Purina made and disseminated the representations and omissions alleged herein in the course of conduct involving trade and commerce.

251. The utility of Purina's practices related to the advertising, labeling, packaging, marketing, promotion and selling of Beneful while making affirmative misrepresentations and without properly disclosing its true nature and/or characteristics is negligible, if any, when

1 weighed against the harm to the general public, the Illinois Plaintiffs, the Illinois Class and the
2 Illinois Subclass.

3 252. The harmful impact upon members of the general public targeted by such
4 practices and the members of the Illinois Class and the Illinois Subclass who purchased and
5 used Beneful outweighs any reasons or justifications by Purina for the unfair and deceptive
6 business practices Purina employed to sell Beneful described herein.

7 253. Purina had an improper motive (profit before accurate marketing) in its practices
8 related to the advertising, labeling, packaging, marketing, promotion and selling of Beneful, as
9 set forth *supra*.

10 254. The use of such unfair and deceptive business acts and practices was and is
11 under the sole control of Purina, and was deceptively hidden from the Illinois Plaintiffs, the
12 members of the Illinois Class and the Illinois Subclass, and the general public in Purina's
13 advertising, labeling, packaging, marketing, promotion and selling of Beneful in a deceptive
14 effort to put profit over accurate marketing. These deceptive acts and practices had a capacity,
15 tendency, and/or likelihood to deceive or confuse reasonable consumers into believing that
16 Beneful was healthy, was free of excessive harmful toxic substances and was otherwise safe.

17 255. As a direct and proximate result of Purina's deceptive and unfair conduct and/or
18 violations of the ICFA, Plaintiffs and the members of the Illinois Class and the Illinois Subclass
19 have suffered and continue to suffer damages, including without limitation the following:

- 20 f) The difference in value between the value of Beneful as represented (the
21 full purchase prices) and the actual value of Beneful (\$0, because
22 consumers would not have paid anything for it had they known it
23 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); i.e.,
24 the full purchase prices of the Beneful ;
- 25 g) All veterinary bills incurred as a result of illness, injury or death caused
26 by consuming Beneful;

1 h) All bills incurred for the disposition of the remains of dogs killed by
2 Beneful; and

3 i) The market value of the dogs killed as a result of ingesting Beneful.

4 256. Illinois also provides protection to purchasers of animal food from unfair and
5 deceptive practices. 505 ILCS 30/7 (Adulteration), 505 ILCS 30/8 (Misbranding), and 505
6 ILCS 30/11.1 (Prohibited Acts).

7
8 257. A commercial feed is adulterated if it “bears or contains any poisonous or
9 deleterious substance which may render it injurious to health;” 505 ILCS 30/7, and a
10 commercial feed is misbranded if its “labeling is false or misleading in any particular.” 505
11 ILCS 30/8. Illinois law also prohibits the “manufacture or distribution of any commercial feed
12 that is adulterated or misbranded.” 505 ILCS 30/11.1.

13 258. Beneful contains poisonous, deleterious or nonnutritive substances, which
14 injured the dogs of the Illinois Plaintiff and the members of the Illinois Class and the Illinois
15 Subclass, and the composition or quality of Beneful falls below what is purported or
16 represented by its label, as set forth above.

17
18 259. Plaintiffs and the other members of the Illinois Class and the Illinois Subclass
19 further seek to enjoin such unlawful deceptive acts and practices as described above. Each of
20 the Illinois Class members and the Illinois Subclass members will be irreparably harmed unless
21 the unlawful actions of Purina are enjoined, in that Purina will continue to falsely and
22 misleadingly market and advertise and represent on its packaging the healthy nature of Beneful.
23 Towards that end, the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass request an
24 order granting them injunctive relief requiring removal of the unsafe product from retail outlets,
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1 corrective disclosures and/or disclaimers on the labeling and advertising of Beneful and/or the
2 removal of the harmful ingredients before sales resume.

3 260. Absent injunctive relief, Purina will continue to manufacture and sell unsafe
4 Beneful without warning to consumers of its harmful effects.

5
6 261. In this regard, Purina has violated, and continues to violate, the Illinois
7 Consumer Fraud and Deceptive Business Practices Act, which makes unfair or deceptive acts
8 or practices used or employed in the conduct of any trade or commerce unlawful. As a direct
9 and proximate result of Purina's violation of the Illinois Consumer Fraud and Deceptive
10 Business Practices Act as described above, the Illinois Plaintiffs and the members of the Illinois
11 Class and the Illinois Subclass have suffered damages, as set forth above.

12 **COUNT 22**

13 **Asserted Against Purina on Behalf of the Illinois Plaintiffs, the Illinois Class and the**
14 **Illinois Subclass**
15 **(Breach of Express Warranty)**

16 262. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding
17 and subsequent paragraphs as if fully set forth here verbatim.

18 263. The Illinois Plaintiffs bring this action on behalf of themselves and the Illinois
19 Class and the Illinois Subclass.

20 264. Purina constitutes a "merchant" and a "seller" in connection with its sales of
21 Beneful, as those terms are defined in the Illinois Uniform Commercial Code. Further, the
22 Illinois Plaintiffs and the members of the Illinois Class and the Illinois Subclass constitute
23 "buyers" in connection with their purchases of Beneful from Purina, as that term is defined in
24 the Illinois Uniform Commercial Code. Further, Beneful constitutes "goods," as that term is
25 defined in the Illinois Uniform Commercial Code.

26 265. By affirmations of fact, promises and descriptions made on Beneful's
27 packaging, Purina provided Plaintiffs and the other members of the Illinois Class and Illinois

1 Subclass with written express warranties before or at the time of purchase, including the
2 following:

- 3 j) "Satisfaction Guaranteed. If you're not happy, we're not happy.
4 Complete satisfaction or your money back..."
- 5 k) "At Purina, we're unconditionally devoted to pets. We've dedicated over
6 80 years to developing the high-quality products that satisfy the needs of
7 dogs and cats."
- 8 l) "100% Complete and Balanced Nutrition";
- 9 m) "Made with wholesome rice, real chicken, soy, and accented with
10 veggies and apples, it has the complete nutrition adult dogs need..."
- 11 n) "Healthy."

12 266. These affirmations of facts and promises made by Purina to the Illinois Plaintiffs
13 and the Illinois Class and the Illinois Subclass members related to Beneful and became part of
14 the bases of the bargains between them and Purina and thereby created express warranties that
15 the Beneful would conform to those affirmations and promises. Furthermore, the
16 aforementioned descriptions of the Beneful were part of the bases of the bargains for the
17 purchases of Beneful between Purina and the Illinois Plaintiffs and the Illinois Class and the
18 Illinois Subclass members and they created an express warranty that the goods would conform
19 to those descriptions. As previously noted, because Beneful contained Industrial Grade
20 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, it did
21 not conform to the affirmations, promises and descriptions previously mentioned, resulting in
22 breaches of express warranties.
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1 267. Beneful was marketed directly to consumers by Purina, came in sealed
2 packages, and did not change from the time it left Purina's possession until it was purchased by
3 consumers in stores.

4 268. The Illinois Plaintiffs have complied with all conditions precedent to filing this
5 breach of warranty claim, including providing notice of the breach of warranty to the Purina on
6 behalf of themselves and the Illinois Class and the Illinois Subclass, prior to filing this action.
7 Alternatively, the filing of this First Amended Complaint provides sufficient notice of breach to
8 Purina on behalf of the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass.
9 Alternatively, notice need not have been given to Purina because it had actual notice of its
10 breaches of warranty as to the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass.
11

12 269. As a proximate result of Purina's breach of express warranties, Plaintiffs and the
13 members of the Illinois Class and the Illinois Subclass have suffered actual damages as follows:
14 (a) the difference in value between the value of the Beneful as expressly warranted (the full
15 purchase prices) and the value of the Beneful as actually accepted and delivered (\$0, because
16 consumers would not have paid anything for it had they known it contained Industrial Grade
17 Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic); i.e., the
18 full purchase price of the Beneful; (b) the veterinarian bills incurred as a result of consumption
19 of Beneful; (c) the market value of the dogs killed by consumption of Beneful; and (d) the cost
20 of disposing of the remains of the dogs killed by consumption of Beneful. Plaintiffs and
21 members of the Illinois Class cannot return Beneful to Purina for repair as the subject defect is
22 irreparable.
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COUNT 23**Asserted Against Purina on Behalf of the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. (“MMWA”))**

270. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

271. The Illinois Plaintiffs bring this claim on behalf of themselves, the Illinois Class and the Illinois Subclass.

272. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

273. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

274. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

275. The Illinois Plaintiffs and the members of the Illinois Class and the Illinois Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

276. Pursuant to 15 U.S.C. § 2310(e), the Illinois Plaintiffs and the members of the Illinois Class and the Illinois Subclass are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Illinois Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Illinois Plaintiffs, Bisharat and Baker, already gave the required notice on behalf of themselves, the Illinois Class and the Illinois Subclass by letters dated May 15 and 20, 2015.

277. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its

1 contract description as dog food, (c) was adequately contained, packaged and labeled as the
2 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
3 container and label.

4 278. Purina is liable to the Illinois Plaintiffs, the Illinois Class and the Illinois
5 Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
6 merchantability.

7 279. Purina initially breached the implied warranty of merchantability as to the
8 Illinois Plaintiffs and the members of the Illinois Class and Illinois Subclass because Beneful
9 was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
10 Specifically, Beneful contained Industrial Grade Glycols, which have not been approved for
11 use in food, Mycotoxins, Lead, or Arsenic, making Beneful unfit for its ordinary purpose of
12 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
13 dogs.

14 280. Purina further breached its implied warranty of merchantability to the Illinois
15 Plaintiffs and the members of the Illinois Class and the Illinois Subclass because Beneful would
16 not pass without objection in the trade under its contract description as dog food because it
17 contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins,
18 Lead, or Arsenic.

19 281. Purina further breached its implied warranty of merchantability to the Illinois
20 Plaintiffs and the members of the Illinois Class and the Illinois Subclass because Beneful was
21 not adequately contained, packaged, and labeled. The directions and labeling that accompanied
22 the Beneful dog food did not warn the Illinois Plaintiffs and the members of the Illinois Class
23 and the Illinois Subclass of the dangers of feeding Beneful to their dogs.

24 282. Purina finally breached its implied warranty of merchantability to the Illinois
25 Plaintiffs and the members of the Illinois Class and the Illinois Subclass because Beneful did
26 not conform to the promises and affirmations of fact set forth on its container and label, as
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described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

283. Pursuant to 15 U.S.C. § 2310(d)(1), the Illinois Plaintiffs and the members of the Illinois Class and the Illinois Subclass are entitled to recover the following damages proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1) the difference in value between the Beneful as warranted (the full purchase price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful, the cost of disposing of the remains.

284. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Illinois Plaintiffs and the members of the Illinois Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have been reasonably incurred by the Illinois Plaintiffs and the members of the Illinois Class in connection with the commencement and prosecution of this action.

COUNT 24

Asserted Against Purina on Behalf of the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass (Negligence)

285. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

286. The Illinois Plaintiffs bring this action on behalf of themselves, the Illinois Class and the Illinois Subclass.

293. Purina designed, manufactured and sold Beneful, which was unsafe because it contained toxins and had other harmful effects as alleged, *supra*.

294. The existence of Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

295. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

296. Beneful came in sealed packages, and it and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

297. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass beyond and in addition to the damages from purchasing the worthless Beneful.

298. Accordingly, Purina is strictly liable for the damages caused to Plaintiffs, the Illinois Class and the Illinois Subclass, by the unreasonably dangerous Beneful, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 26

Asserted Against Purina on Behalf of the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass

(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

299. The Illinois Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

301. The Illinois Plaintiffs, the Illinois Class and the Illinois Subclass members conferred a benefit on Purina by purchasing Beneful—the gross revenues Purina derived from such sales.

302. Purina accepted and retained the benefit in the amount of the gross revenues it received from sales of Beneful to the Illinois Plaintiffs, the Illinois Class and the Illinois Subclass members.

303. Purina has thereby profited under circumstances which would make it unjust for Purina to be permitted to retain the benefit.

304. The Illinois Plaintiffs, the Illinois Class and the Illinois Subclass members are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to them.

E. INDIANA CAUSES OF ACTION

COUNT 27
**Asserted Against Purina on Behalf of the Indiana Plaintiff, the Indiana Class and the
 Indiana Subclass**
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. (“MMWA”))

305. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

306. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and the Indiana Subclass

307. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

308. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

309. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

1 310. The Indiana Plaintiff and the members of the Indiana Class and the Indiana
2 Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they
3 are persons entitled under applicable state law to enforce against the warrantor the obligations
4 of its implied warranty.

5 311. Pursuant to 15 U.S.C. § 2310(e), the Indiana Plaintiffs and the members of the
6 Indiana Class and the Indiana Subclass are entitled to bring this class action and are not
7 required to give Purina notice and an opportunity to cure until such time as the Court
8 determines the representative capacity of the Indiana Plaintiff pursuant to Rule 23 of the
9 Federal Rules of Civil Procedure. However, Indiana Plaintiffs Benham already gave the
10 required notice on behalf of herself and the Indiana Class by letter dated May 15, 2015.

11 312. In connection with its sale of Beneful, Purina gave an implied warranty as
12 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
13 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
14 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
15 contract description as dog food, (c) was adequately contained, packaged and labeled as the
16 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
17 container and label. Ind. Code §§ 26-1-2-314(2)(a), (c), (e) and (f).

18 313. Purina is liable to the Indiana Plaintiff, the Indiana Class and the Indiana
19 Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
20 merchantability.

21 314. Purina initially breached the implied warranty of merchantability as to the
22 Indiana Plaintiff and the members of the Indiana Class and the Indiana Subclass because
23 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
24 Specifically, Beneful contained Industrial Grade Glycols, which have not been approved for
25 use in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of
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1 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
2 dogs.

3 315. Purina further breached its implied warranty of merchantability to the Indiana
4 Plaintiff and the members of the Indiana Class and the Indiana Subclass because Beneful would
5 not pass without objection in the trade under its contract description as dog food, as it contained
6 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
7 Arsenic.

8 316. Purina further breached its implied warranty of merchantability to the Indiana
9 Plaintiff and the members of the Indiana Class and the Indiana Subclass because Beneful was
10 not adequately contained, packaged, and labeled. The directions and labeling that accompanied
11 the Beneful dog food did not warn the Indiana Plaintiff and the members of the Indiana Class
12 and the Indiana Subclass of the dangers of feeding Beneful to their dogs.

13 317. Purina finally breached its implied warranty of merchantability to the Indiana
14 Plaintiff and the members of the Indiana Class and the Indiana Subclass because Beneful did
15 not conform to the promises and affirmations of fact set forth on its container and label, as
16 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
17 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
18 satisfaction was not guaranteed.

19 318. Pursuant to 15 U.S.C. § 2310(d)(1), the Indiana Plaintiff and the members of the
20 Indiana Class and the Indiana Subclass are entitled to recover the following damages
21 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
22 the difference in value between the Beneful as warranted (the full purchase price) and the
23 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
24 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
25 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
26 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
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the cost of disposing of the remains. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Indiana Plaintiff and the members of the Indiana Class and the Indiana Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by the Indiana Plaintiff and the members of the Indiana Class and the Indiana Subclass in connection with the commencement and prosecution of this action.

COUNT 28

Asserted Against Purina on Behalf of the Indiana Plaintiff, the Indiana Class and the Indiana Subclass (Breach of Express Warranty, Ind. Code § 26-1-2-313)

319. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

320. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and the Indiana Subclass.

321. Purina constituted both a "merchant" and a "seller," as those terms are defined in Ind. Code §§ 26-1-2-103 and 104, in connection with its sale of Beneful to the Indiana Plaintiff, the Indiana Class and the Indiana Subclass. Further, the Indiana Plaintiff and the members of the Indiana Class and the Indiana Subclass constituted "buyers," as that term is defined in Ind. Code § 26-1-2-103. Beneful, itself, constituted "goods," as that term is defined in Ind. Code § 26-1-2-105.

322. The statements on Purina's packaging for Beneful created express warranties, including that Beneful was safe for consumption by pets, under both common law and Ind. Code § 26-1-2-313. Said statements include, but are not limited to, Beneful dog food being "healthy," offering "great nutrition" to dogs, promoting "healthy growth" and that customers' satisfaction would be guaranteed.

323. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the

1 bargain for the purchase of Beneful and created an express warranty that Beneful would
2 conform to those affirmations of fact and promises.

3 324. Likewise, the statements as described in detail above constituted descriptions of
4 Beneful that became part of the basis of the bargain for the purchase of Beneful and created an
5 express warranty that Beneful would conform to those descriptions.

6 325. Beneful contained Industrial Grade Glycols, which have not been approved for
7 use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

8 326. The Indiana Plaintiff and the members of the Indiana Class and the Indiana
9 Subclass were injured as a proximate result of Purina's aforementioned breaches as follows: (a)
10 in the amount of the difference in value between the value of the Beneful as warranted (its full
11 purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have
12 paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead,
13 or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c)
14 for those whose dogs died from consuming Beneful, the market value of those dogs; and (d) for
15 those whose dogs died from consuming Beneful, the cost of disposing of their remains.

16 327. Within a reasonable time after their discovery of Purina's breaches, the Indiana
17 Plaintiff gave notice of the breaches of the express warranties on behalf of herself, the Indiana
18 Class and the Indiana Subclass. Alternatively, this pleading constitutes a sufficient notice of
19 Purina's breaches of the express warranties. Alternatively, it was not necessary for the Indiana
20 Plaintiff to give Purina notice of its breaches of the express warranties because Purina had
21 actual notice of its breaches of warranty as to the Indiana Plaintiff, the Indiana Class and the
22 Indiana Subclass.

COUNT 29**Asserted Against Purina on Behalf of the Indiana Plaintiff, the Indiana Class and the Indiana Subclass****(Breach of the Implied Warranty of Merchantability, Ind. Code § 26-1-2-314)**

328. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

329. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and the Indiana Subclass.

330. Purina is a “seller” and “merchant” as to Beneful within the meaning of Ind. Code §§ 26-1-2-103 and 104. Purina designed, manufactured and sold Beneful, which constitutes “goods” within the meaning of Ind. Code § 26-1-2-105. The Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass constituted “buyers” within the meaning of Ind. Code § 26-1-2-103. Consequently, pursuant to Ind. Code §§ 26-1-2-314(2)(a), (c), (e) & (f), Purina impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food, (b) could pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged, and labeled as the agreements required, and (d) conformed to the promises and affirmations of fact set forth on its container and labels.

331. Purina initially breached the implied warranty of merchantability as to the Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass because Beneful was not fit for the ordinary purposes for which it is used -- a safe, healthy dog food. Specifically, Beneful contained Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

332. Purina further breached its implied warranty of merchantability to the Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass because Beneful would

1 not pass without objection in the trade under its contract description as dog food, as it contained
2 Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or
3 Arsenic.

4 333. Purina further breached its implied warranty of merchantability to the Indiana
5 Plaintiff, the members of the Indiana Class and the Indiana Subclass because Beneful was not
6 adequately contained, packaged, and labeled. The directions and labeling that accompanied
7 Beneful did not warn the Indiana Plaintiff, the members of the Indiana Class and the Indiana
8 Subclass of the dangers of feeding Beneful to their dogs.

9 334. Purina finally breached its implied warranty of merchantability to the Indiana
10 Plaintiff, the members of the Indiana Class and the Indiana Subclass because Beneful did not
11 conform to the promises and affirmations of fact set forth on its container and label, as
12 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
13 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
14 satisfaction was not guaranteed.

15 335. The Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass
16 were injured as a proximate result of Purina’s aforementioned breaches as follows: (a) in the
17 amount of the difference in value between the value of the Beneful as warranted (its full
18 purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have
19 paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead,
20 or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c)
21 for those whose dogs died from consuming Beneful, the market value of those dogs; and (d) for
22 those whose dogs died from consuming Beneful, the cost of disposing of their remains.

23 336. Within a reasonable time after their discovery of Purina’s breaches, the Indiana
24 Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of
25 herself, the Indiana Class and the Indiana Subclass. Alternatively, this pleading constitutes a
26 sufficient notice of Purina’s breaches of the implied warranty of merchantability.
27

Alternatively, it was not necessary for the Indiana Plaintiff to give Purina notice of its breaches of the implied warranty of merchantability because Purina had actual notice of its breaches of warranty as to the Indiana Plaintiff, the Indiana Class and the Indiana Subclass.

COUNT 30

Asserted on Behalf of the Indiana Plaintiff, the Indiana Class and the Indiana Subclass (Violation of Indiana's Deceptive Consumer Sale Act ("IDCSA"), Ind. Code § 24-5-0.5, et seq.)

337. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

338. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and the Indiana Subclass.

339. The Indiana Plaintiff and the members of the Indiana Class and the Indiana Subclass are "persons" within the meaning of Ind. Code § 24-5-.0.5-2(a)(2).

340. Purina is a "supplier" within the meaning of Ind. Code § 24-5-0.5-2(a)(3).

341. The sale of Beneful to the Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass constituted a "consumer transaction" within the meaning of Ind. Code § 24-5-0.5-2(a)(1), and Purina's actions as set forth herein occurred in the conduct of trade or commerce.

342. The IDCSA prohibits a supplier from committing an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction. Ind. Code § 24-5-0.5-3(a). The following acts and representations as to the subject matter of a consumer transaction by a supplier, *inter alia*, constitute deceptive acts under the IDCSA: (1) "That such subject of a consumer transaction has ... performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have," and (2) "That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not." Ind. Code §§ 24-5-0.5-3(b)(1) & (2).

1 343. By marketing and selling Beneful containing Industrial Grade Glycols, which
2 have not been approved for use in food, Mycotoxins, Lead, or Arsenic, as described in detail,
3 *supra*, Purina engaged in unfair, abusive and deceptive acts, omissions and practices prohibited
4 by IDCSA, including: representing that the Beneful had characteristics, benefits and qualities
5 (safe, healthy dog food) which it did not have when it knew or reasonably should have known
6 that it did not; and representing that it was of a particular standard, quality, and grade (safe,
7 healthy dog food) when it was not when it knew or reasonably should have known that it was
8 not; and knowingly failing to disclose the presence of Industrial Grade Glycols, which have not
9 been approved for use in food, Mycotoxins, Lead, or Arsenic.

10 344. Pursuant to Ind. Code § 24-5-0.5-5(a), by letter dated May 15, 2015, the Indiana
11 Plaintiff gave Purina written notice, on her own behalf, on behalf of the Indiana Class and the
12 Indiana Subclass, of the nature of Purina's deceptive acts and the actual damages suffered from
13 those acts. By letter dated May 18, 2015, Purina refused to make a cure, making Purina's
14 deceptive acts uncured under the IDCSA. Purina's deceptive acts are also incurable, because
15 they were engaged in by Purina as a part of a scheme, artifice, or device with an intent to
16 defraud or mislead in that Purina was aware that Beneful contained Industrial Grade Glycols,
17 which have not been approved for use in food, Mycotoxins, Lead, or Arsenic, yet it continued
18 to market and sell Beneful as being "healthy," offering "great nutrition," and promoting
19 "healthy growth."

20 345. The Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass
21 relied upon Purina's uncured and incurable deceptive acts in purchasing Beneful. Purina's
22 conduct in the sale and marketing of Beneful was uniform with respect to the Indiana Plaintiff,
23 the members of the Indiana Class and the Indiana Subclass, such that reliance can be
24 determined on a class-wide basis. Indeed, had Purina not represented that it was safe, healthy
25 food or had it disclosed the truth about Beneful, it can be presumed that any reasonable
26 consumer, including the Indiana Plaintiff and the members of the Indiana Class, would not have
27

1 purchased Beneful, and, therefore, that all of them relied upon Purina's uncured and incurable
2 deceptive acts.

3 346. As a direct and proximate cause of Purina's violations of the IDCSA, the
4 Indiana Plaintiff and other members of the Indiana Class have suffered injury in fact and/or
5 actual damages.

6 347. Pursuant to Ind. Code § 24-5-0.5-4(a), the Indiana Plaintiff and the members of
7 the Class are entitled to recover the following damages from Purina: (1) the difference in value
8 between the Beneful as warranted (the full purchase price) and the Beneful as actually
9 delivered (\$0.00, because consumers would not have paid anything for it had they known it
10 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the veterinarian bills
11 caused by consumption of Beneful; (3) for those whose pets died from eating Beneful, the
12 market value of the dogs; and (4) for those whose dogs died from eating Beneful, the cost of
13 disposing of the remains. Because Purina's deceptive acts were willful, the Indiana Plaintiff,
14 the members of the Indiana Class and the Indiana Subclass are entitled to have their damages
15 increased by the Court in an amount of up to three times their actual damages. Ind. Code § 24-
16 5-0.5-4(a)(1). The Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass
17 are also entitled to recover from Purina their reasonable attorney's fees pursuant to Ind. Code §
18 24-5-0.5-4(a).

19 **COUNT 31**

20 **Asserted Against Purina on Behalf of the Indiana Plaintiff, the Indiana Class and the** 21 **Indiana Subclass** 22 **(Negligence)**

23 348. The Indiana Plaintiff incorporates herein the allegations of all of the preceding
24 and subsequent paragraphs as if fully set forth here verbatim.

25 349. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and
26 the Indiana Subclass.
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1 350. The Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass
2 commenced their negligence claim within two years of when they knew or, in the exercise of
3 ordinary diligence, could have discovered that they had suffered injuries as a result of Purina's
4 negligence.

5 351. Purina owed a duty of reasonable care to the Indiana Plaintiff, the members of
6 the Indiana Class and the Indiana Subclass to provide dog food that was safe for consumption
7 by dogs, free from excessive amounts of toxins with harmful effects.

8 352. Purina breached this duty by designing, manufacturing, marketing and selling
9 Beneful, which contained excessive amounts of harmful toxins, without adequate quality
10 control and testing; without using proper manufacturing and production practices; without
11 properly investigating reports of pet deaths and illnesses following consumption of Beneful;
12 and without adequately warning the Indiana Plaintiff, the members of the Indiana Class and the
13 Indiana Subclass of Beneful's dangers on its packaging. Such conduct by Purina was negligent
14 because it did not reflect the level of care that an ordinarily prudent and reasonable person in
15 Purina's place would have given under the same or similar circumstances.

16 353. Purina should have known that Beneful posed a risk of harm to dogs; that
17 purchasers of Beneful, including the Indiana Plaintiff, the members of the Indiana Class and the
18 Indiana Subclass, would not recognize the risk; and that consumption of Beneful by pets would
19 foreseeably result in their injury and death. Such injury and death to the dogs constituted
20 property damage to the Indiana Plaintiff, the members of the Indiana Class and the Indiana
21 Subclass beyond and in addition to their damages from purchasing the worthless Beneful.

22 354. As a proximate result of Purina's negligent acts alleged herein, the Indiana
23 Plaintiff, the members of the Indiana Class and the Indiana Subclass suffered injury to property,
24 specifically the illness and deaths of their dogs, and the expenses associated therewith.
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COUNT 32**Asserted Against Purina on Behalf of the Indiana Plaintiff, the Indiana Class and the Indiana Subclass
(Strict Products Liability – Ind. Code § 34-20-1, et seq.)**

355. The Indiana Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

356. The Indiana Plaintiff brings this claim on behalf of herself, the Indiana Class and the Indiana Subclass.

357. The Indiana Plaintiff, the Indiana Class and the Indiana Subclass' strict products liability claim was commenced within two years of when they knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of Beneful, a defective product manufactured and put into the stream of commerce by Purina.

358. Purina engaged in the business of selling Beneful. Purina designed, manufactured, marketed and sold Beneful. Purina put Beneful into the steam of commerce. Beneful contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead.

359. At the time Beneful was conveyed to the Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass, it was in a condition not contemplated by reasonable persons among those considered expected users and consumers of the product and was unreasonably dangerous to the expected users and consumers when used in reasonably expectable ways of handling or consumption because of the presence of Industrial Grade Glycols, which have not been approved for use in food, Mycotoxins, Lead, or Arsenic. Beneful was, therefore, defective.

360. Beneful was also defective because Purina failed to properly package or label Beneful to give reasonable warnings of danger about the product or to give reasonably complete instructions on the proper use of the product, when Purina, by exercising reasonable diligence, could have made such warnings or instructions available to the Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass.

1 369. Purina holds money, namely the gross revenues it derived from its sale of
 2 Beneful to, and at the expense of, the Indiana Plaintiff, the members of the Indiana Class and
 3 the Indiana Subclass, which in equity and good conscience belongs to the Indiana Plaintiff, the
 4 members of the Indiana Class and the Indiana Subclass.

5 370. Based upon assumpit/money had and received unjust enrichment/restitution, the
 6 Indiana Plaintiff, the members of the Indiana Class and the Indiana Subclass are entitled to
 7 recover the full amount of all gross revenue derived by Purina from the sale of Beneful to them.

8 **F. KANSAS CAUSES OF ACTION**

9 **COUNT 34**

10 **Asserted Against Purina on Behalf of the Kansas Plaintiff, the Kansas Class and the** 11 **Kansas Subclass** 12 **(Breach of Express Warranty)**

13 371. The Kansas Plaintiff and the Kansas Class members incorporate by reference
 14 each preceding and succeeding paragraph as though fully set forth at length herein.

15 372. The Kansas Plaintiff brings this action on behalf of herself, the Kansas Class and
 16 the Kansas Subclass.

17 373. Purina constitutes a “merchant” and a “seller” in connection with its sales of
 18 Beneful, as those terms are defined in the Kansas Uniform Commercial Code. Further, the
 19 Kansas Plaintiff, the Kansas Class and the Kansas Subclass members constitute “buyers” in
 20 connection with their purchases of Beneful from Purina, as that term is defined in the Kansas
 21 Uniform Commercial Code. Further, Beneful constitutes “goods,” as that term is defined in the
 22 Kansas Uniform Commercial Code. As these are consumer transactions, no direct contractual
 23 relationship is required between Purina and Kansas Class members.

24 374. By affirmations of fact, promises and descriptions made on Beneful’s packaging
 25 and which relate to such goods, Purina provided the Kansas Plaintiff, the members of the
 26 Kansas Class and the Kansas Subclass with written express warranties before or at the time of
 27 purchase, including the following:

- 1 o) “Satisfaction Guaranteed. If you’re not happy, we’re not happy.
- 2 Complete satisfaction or your money back....”
- 3 p) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated
- 4 over 80 years to developing the high-quality products that satisfy the
- 5 needs of dogs and cats.”
- 6 q) “100% Complete and Balanced Nutrition”;
- 7 r) “Made with wholesome rice, real chicken, soy, and accented with
- 8 veggies and apples, it has the complete nutrition adult dogs need....”
- 9 s) “Healthy”

10 375. These affirmations of facts and promises made by Purina to the Kansas Plaintiff,

11 the Kansas Class and the Kansas Subclass members related to Beneful and became part of the

12 bases of the bargains between them and Purina and thereby created express warranties that

13 Beneful would conform to those affirmations and promises. Furthermore, the aforementioned

14 descriptions of Beneful were part of the bases of the bargains for the purchases of Beneful

15 between Purina and the Kansas Plaintiff, the Kansas Class and the Kansas Subclass members

16 and they created an express warranty that the goods would conform to those descriptions. As

17 previously noted, because Beneful contained Industrial Grade Glycols, which have not been

18 approved for use in food, Mycotoxins, Lead, or Arsenic, it did not conform to the affirmations,

19 promises and descriptions previously mentioned, resulting in breaches of express warranties.

20 376. Beneful was marketed directly to consumers by Purina, came in sealed

21 packages, and did not change from the time it left Purina’s possession until it was purchased by

22 consumers in stores.

1 377. The Kansas Plaintiff has complied with all conditions precedent to filing this
2 breach of warranty claim, including providing timely notice of these breaches of warranty to
3 Purina on behalf of herself, the Kansas Class and the Kansas Subclass within a reasonable time
4 after discovering that Beneful might have proximately caused the damages described herein.
5 Such notice was reasonable based on the circumstances of this case, including the fact Purina
6 has engaged in a campaign to prevent other affected consumers from publicly discussing
7 similar claims while at the same time expressly denying any relationship between the
8 consumption of Beneful and the injuries here at issue. Alternatively, this pleading constitutes
9 adequate notice on behalf of the Kansas Plaintiff, the Kansas Class and the Kansas Subclass.
10 Alternatively, notice need not have been given to Purina because it had actual notice of its
11 breaches of warranty as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass.
12

13 378. As a proximate result of Purina's breach of express warranties, the Kansas
14 Plaintiff, the members of the Kansas Class and the Kansas Subclass have suffered actual
15 damages as follows: (a) the difference in value between the value of the Beneful as expressly
16 warranted (the full purchase prices) and the value of the Beneful as actually accepted and
17 delivered (\$0, because consumers would not have paid anything for it had they known it
18 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); i.e., the full purchase price
19 of the Beneful; (b) the veterinarian bills incurred as a result of consumption of Beneful; (c) the
20 market value of the dogs killed by consumption of Beneful; and (d) the cost of disposing of the
21 remains of the dogs killed by consumption of Beneful. The Kansas Plaintiff, the members of
22 the Kansas Class and the Kansas Subclass cannot return Beneful to Purina for repair as the
23 subject defect is irreparable.
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COUNT 35**Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass
(Breach of the Implied Warranty of Merchantability, K.S.A. § 84-2-314)**

379. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

380. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass, as those terms are defined in the Kansas Uniform Commercial Code. Further, the Kansas Plaintiff, the Kansas Class and the Kansas Subclass members constituted “buyers” as that term is defined in the Kansas Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Kansas Uniform Commercial Code. As this is a consumer transaction, no direct contractual relationship is required between the Kansas Plaintiff, the Kansas Class, the Kansas Subclass members and Purina.

381. As part of the sales to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass, Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled, and conform to the promises or affirmations of fact made on the containers or labels.

382. Beneful breached the warranty of implied merchantability initially because it would not pass without objection in the trade under the contract description. Specifically, dog food that is unsafe for consumption for dogs and that is highly likely to cause illness and death will not pass without objection in the trade under the description of dog food, nor could such a

1 defect reasonably be discovered by any reasonable form of examination prior to use or
2 consumption. In addition, Purina breached the implied warranty as to Beneful, because
3 Beneful was not fit for the ordinary purpose for which it is used, which is safely feeding dogs.
4 Further, Purina breached the implied warranty of merchantability because Beneful was not
5 adequately contained, packaged or labeled because it failed to warn of the dangers of its
6 consumption by dogs. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass
7 members' reasonable expectations as to the function of such products was that they would not
8 injure or kill their dogs once consumed, or would not contain or have a probability, likelihood
9 or tendency to Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic.

11 383. At the time of sale to the Kansas Plaintiff, the Kansas Class and the Kansas
12 Subclass and throughout the Class Period, Purina made promises and affirmations of fact on the
13 packaging of Beneful to the effect that Beneful was safe for consumption by pets. Said
14 representations included, but were not limited to, Beneful being “healthy,” offering “great
15 nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be
16 guaranteed.

18 384. However, Purina breached the implied warranty of merchantability because
19 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
20 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
21 customers’ satisfaction was not guaranteed. For the reasons set forth above, Beneful was
22 defective, such defect was present when Beneful left Purina’s control, and such defect caused
23 the Kansas Plaintiff, the Kansas Class and the Kansas Subclass members' injuries.

25 385. Within a reasonable time after the discovery of Purina’s breach of the implied
26 warranty and the possible link of Beneful to the illness and death of their pet, the Kansas
27

1 Plaintiff gave notice of such breaches on behalf of herself, the Kansas Class and the Kansas
 2 Subclass. Alternatively, this pleading constitutes adequate notice on behalf of the Kansas
 3 Plaintiff, the Kansas Class and the Kansas Subclass. Alternatively, no notice was required
 4 because Purina was already aware of its breaches as to the Kansas Plaintiff, the Kansas Class
 5 and the Kansas Subclass.

6
 7 386. As a proximate result of this breach of implied warranty by Purina, the Kansas
 8 Plaintiff, the Kansas Class and the Kansas Subclass have been damaged in the following
 9 manner: (a) by the difference in value between the value of the Beneful as warranted (the full
 10 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
 11 would not have paid anything for it had they known it contained Industrial Grade Glycols,
 12 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c)
 13 for those whose pets died from eating Beneful, the market value of the dogs; and (d) for those
 14 whose dogs died from eating Beneful, the cost of disposing of the remains.

15 **COUNT 36**

16 **Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass** **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. (“MMWA”))**

17 387. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members
 18 incorporate by reference each preceding and succeeding paragraph as though fully set forth at
 19 length herein.

20 388. The Kansas Plaintiff brings this claim on behalf of herself, the Kansas Class and
 21 the Kansas Subclass.

22 389. At all times relevant hereto, there was in full force and effect the Magnuson-
 23 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

24 390. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

25 391. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

1 392. The Kansas Plaintiff, the members of the Kansas Class and the Kansas Subclass
2 are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are
3 persons entitled under applicable state law to enforce against the warrantor the obligations of its
4 implied warranty.

5 393. Pursuant to 15 U.S.C. § 2310(e), the Kansas Plaintiff, the members of the
6 Kansas Class and the Kansas Subclass are entitled to bring this action and are not required to
7 give Purina notice and an opportunity to cure until such time as the Court determines the
8 representative capacity of the Kansas Plaintiff pursuant to Rule 23 of the Federal Rules of Civil
9 Procedure. However, the Kansas Plaintiff already gave any required notice on behalf of
10 herself, the Kansas Class and the Kansas Subclass by letter dated May 13, 2015.

11 394. In connection with its sale of Beneful, Purina gave an implied warranty as
12 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
13 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
14 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
15 contract description as dog food, (c) was adequately contained, packaged and labeled, and (d)
16 conformed to the promises and affirmations of fact set forth on its container and label.

17 395. Purina is liable to the Kansas Plaintiff, the Kansas Class and the Kansas
18 Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
19 merchantability.

20 396. Purina initially breached the implied warranty of merchantability as to the
21 Kansas Plaintiff, the members of the Kansas Class and the Kansas Subclass because Beneful
22 was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
23 Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in
24 food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing
25 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

1 397. Purina further breached its implied warranty of merchantability to the Kansas
2 Plaintiff, the members of the Kansas Class and the Kansas Subclass because Beneful would not
3 pass without objection in the trade under its contract description as dog food, as it contained
4 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
5 Arsenic.

6 398. Purina further breached its implied warranty of merchantability to the Kansas
7 Plaintiff, the members of the Kansas Class and the Kansas Subclass because Beneful was not
8 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
9 Beneful dog food did not warn the Kansas Plaintiff, the members of the Kansas Class and the
10 Kansas Subclass of the dangers of feeding Beneful to their dogs.

11 399. Purina further breached its implied warranty of merchantability to the Kansas
12 Plaintiff, the members of the Kansas Class and the Kansas Subclass because Beneful did not
13 conform to the promises and affirmations of fact set forth on its container and label, as
14 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
15 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
16 satisfaction was not guaranteed.

17 400. Pursuant to 15 U.S.C. § 2310(d)(1), the Kansas Plaintiff, the members of the
18 Kansas Class and the Kansas Subclass are entitled to recover the following damages
19 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
20 the difference in value between the Beneful as warranted (the full purchase price) and the
21 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
22 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
23 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
24 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
25 the cost of disposing of the remains.
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401. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Kansas Plaintiff, the members of the Kansas Class and the Kansas Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by the Kansas Plaintiff, the members of the Kansas Class and the Kansas Subclass in connection with the commencement and prosecution of this action.

COUNT 37

**Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass
(Negligence)**

402. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

403. Purina owed a duty of care to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass to provide pet food that was safe for consumption by dogs, free from substances, including Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic that could have harmful effects if consumed.

404. Purina breached this duty by selling Beneful, which was not safe and contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of Beneful; and without adequately warning the Kansas Plaintiff, the Kansas Class and the Kansas Subclass of such dangers on Beneful's packaging. Such conduct by Purina was negligent in that Purina failed to act as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances.

405. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the Kansas Plaintiff, the Kansas Class and the Kansas Subclass, would not recognize the risk; and that consumption of Beneful by dogs would

foreseeably result in injury and death to those dogs, constituting property damage to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass beyond and in addition to their damages from purchasing the worthless Beneful.

406. As a proximate result of Purina's negligent acts alleged herein, the Kansas Plaintiff, the Kansas Class and the Kansas Subclass suffered injury to property, specifically in the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 38

Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass (Strict Products Liability)

407. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

408. Purina designed, manufactured, distributed and sold Beneful, which was unsafe because it contained toxins and had other harmful effects as alleged in the factual section above.

409. The existence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

410. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

411. Beneful came in sealed packages, and both the product and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

412. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Kansas Plaintiff and the Kansas Class beyond and in addition to their damages from purchasing the worthless Beneful.

413. Accordingly, Purina is strictly liable for the damages caused to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass by the consumption of the unreasonably dangerous Beneful, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 39

**Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass
(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

414. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

415. This claim in quasi-contract is based upon principles of restitution. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and will restore to the person entitled thereto that which in equity and good conscience belongs to another.

416. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members conferred a benefit on Purina by purchasing Beneful in the form of the gross revenues Purina derived from such sales, which they would not have conferred had the true facts detailed above been disclosed by Purina.

417. At the expense of the Kansas Plaintiff, the Kansas Class and the Kansas Subclass, Purina received, appreciated and accepted benefits in the form of the gross revenues Purina derived from sales of Beneful to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass members.

418. For the reasons detailed above, Purina has profited and accepted such benefits under circumstances where it engaged in improper, deceitful or misleading conduct that would

419. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to them.

COUNT 40

**Asserted as to the Kansas Plaintiff, the Kansas Class and the Kansas Subclass
(Violation of the Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-626, *et seq.*)**

420. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

421. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members were actual purchasers and users of Beneful products that were introduced into the stream of commerce, manufactured, distributed and sold by Purina throughout Kansas and the United States. Purina is a “supplier” for purposes of this statute

422. As set forth in detail above Purina disseminated unhealthy and dangerous Beneful dog food despite making numerous uniform material representations about the guaranteed and healthy nature of the Product, and it omitted and willfully failed to disclose material facts to the contrary despite having learned of the potential presence of dangerous substances in Beneful, including Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, prior to such sales. In so doing, Purina engaged in and/or caused others to engage in deceptive or unconscionable acts in connection with consumer transactions. In violation of the following provisions of K.S.A. § 50-626 and -627, Purina, either knowingly or with reason to know, misleadingly claimed that Beneful:

“(b)(1)(A) has sponsorship, approval, characteristics, ingredients, uses or benefits that they do not have;

“(D) are of a particular standard, quality, grade, style or model, if they are of another which differs materially from the representation;

“(F) has uses, benefits or characteristics unless [Purina] relied upon and possesses a reasonable basis for making such representation; or

“(G) use, benefit or characteristic of property has been proven or otherwise substantiated unless [Purina] relied upon and possesses the type and amount of proof or substantiation represented to exist”;

(2) willfully used, in any written representation, an exaggeration, falsehood, innuendo or ambiguity as to a material fact; and

(3) willfully failed to state a material fact, or the willfully concealed, suppressed or omitted a material fact.

423. These deceptive trade practices occurred in the course of Purina’s business.

424. The Kansas Plaintiff, the Kansas Class and the Kansas Subclass members would not have purchased Beneful products at the prices that they did, if at all, but for Purina’s wrongful failure to disclose the tendency of those products to contain Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

425. As a result of the commission of these deceptive trade practices and failure to disclose the above material omitted facts by Purina, the Kansas Plaintiff, the Kansas Class and the Kansas Subclass members were injured and suffered actual damages or economic losses, which include (a) the difference in value between the value of the Beneful as expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted and delivered (\$0, because it was unsafe and unfit for its ordinary purpose and thus reduced or eliminated its value); i.e., the full purchase price of the Beneful; (b) the veterinarian bills incurred as a result of consumption of Beneful; (c) the market value of the dogs killed by

consumption of Beneful; and (d) the cost of disposing of the remains of the dogs killed by consumption of Beneful.

G. MASSACHUSETTS CAUSES OF ACTION

COUNT 41

**Asserted as to the Massachusetts Plaintiff, the Massachusetts Class
and the Massachusetts Subclass
(Unfair and Deceptive Conduct in Violation of M.G.L., c. 93A, § 2)**

426. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

427. This Count is brought by the Massachusetts Plaintiff on behalf of herself, the Massachusetts Class and the Massachusetts Subclass.

428. Purina's conduct, as alleged herein constituted unfair or deceptive acts or practices and unfair methods of competition in trade or commerce in violation of M.G.L., c. 93A, § 2, and the regulations promulgated thereunder, including, without limitation, the following:

- a) 940 C.M.R. § 3.02 (prohibiting, among other things, statements or illustrations used in advertisements which create a false impression of the grade, quality, value, or usability of the product offered);
- b) 940 C.M.R. § 3.05(1) (prohibiting claims or representations "made by any means concerning a product which, directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect");
- c) 940 C.M.R. § 3.05(2) (prohibiting the use of any advertisement "which would mislead or tend to mislead buyers or prospective buyers, through

pictorial representations or in any other manner, as to the product being offered for sale”);

d) 940 C.M.R. § 3.08(2) (providing that it “shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty”);

e) 940 C.M.R. § 3.16(2) (providing that it is a violation of c. 93A, § 2 to “fail to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer to enter into the transaction”); and

f) 940 C.M.R. § 3.16(3) (providing that an act or practice violates c. 93A, § 2 if it “fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public’s health, safety or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide consumers of this Commonwealth protection”).

429. Purina’s unlawful conduct, in violation of c. 93A, § 2 and the regulations referenced in the preceding paragraph, include, but are not limited to: (a) its false and misleading statements, representations, and depictions in its labeling, packaging, marketing and advertising for Beneful, including representing that Beneful offers “100% complete and balanced nutrition,” that is “healthy” for dogs and that it promotes dogs’ “healthy growth”; (b) the fact that, contrary to Purina’s representations of Beneful as healthy and safe for dogs, Purina omitted that Beneful instead contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic; (c) Beneful was hazardous and toxic to dogs and caused the Massachusetts Plaintiff’s, the Massachusetts Class and the Massachusetts

1 Subclass members' dogs to become ill and, in some cases, die; and (d) its breach of the implied
2 warranty of merchantability, all as alleged in greater detail herein.

3 430. Massachusetts laws provide protection to purchasers of animal food from unfair,
4 deceptive and unconscionable practices in its commercial feed statute. M.G.L., c. 128, §§ 56
5 (prohibiting adulteration and misbranding of commercial feed); 54 (defining adulteration); and
6 55 (misbranding).

7 431. The commercial feed statute provides that "[n]o person shall (a) manufacture or
8 distribute any commercial feed that is adulterated or misbranded; (b) adulterate or misbrand
9 any commercial feed." M.G.L. c. 128, § 56. A commercial feed shall be deemed to be
10 adulterated if: "(1) it bears or contains any poisonous or deleterious substance which may
11 render it injurious to health; (2) it bears or contains any added poisonous, added deleterious or
12 added non-nutritive substance which is unsafe within the meaning of section four hundred and
13 nine of the Federal Food, Drug and Cosmetic Act, other than one which is (i) a pesticide
14 chemical in or on a raw agricultural commodity; or (ii) a food additive"; or "(7) its composition
15 or quality falls below or differs from that which it is purported or represented to possess by its
16 labeling." M.G.L. c. 128, § 54. Commercial feed is misbranded when, among other things, "its
17 labeling is false or misleading in any particular manner." M.G.L. c. 128, § 55.

18 432. Beneful contains poisonous, deleterious or non-nutritive substances which
19 injured the dogs of the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts
20 Subclass members, and the composition or quality of Beneful falls below what is purported or
21 represented by its label, as set forth above.

22 433. Further, Beneful is misbranded in that its labeling is false and misleading for the
23 reasons set forth in detail herein.

24 434. Accordingly, Purina's conduct, as alleged in detail herein, violated M.G.L. c.
25 128, §§ 55 and 56. Violations of these provisions, which are designed to protect consumers,
26 constitute *per se* violations of c. 93A § 2, pursuant to 940 C.M.R. § 3.16(3).
27

1 435. The Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts
2 Subclass members have been injured by Purina's unfair and deceptive conduct, as alleged
3 herein.

4 436. The Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts
5 Subclass members suffered actual damages, which they seek to recover in at least the following
6 categories:

- 7 a) Veterinary bills incurred as a result of their dogs' illnesses or injuries
8 caused by consumption of Beneful;
- 9 b) The costs of disposing of the remains of their dogs killed by
10 consumption of Beneful;
- 11 c) The values of their dogs killed by consumption of Beneful; and
- 12 d) The amounts they paid for Beneful: the difference between the value of
13 Beneful as represented (the purchase price) and the value of Beneful as
14 actually accepted and delivered (which was \$-0-, because of the unsafe
15 and hazardous nature of the product).

17 437. Purina's unfair and deceptive acts or practices, as alleged herein, were willful or
18 knowing violations of M.G.L. c. 93A, § 2, within the meaning of M.G.L. c. 93A, § 9(3).

19 438. On May 4, 2015, Massachusetts Class and Subclass member Paul Malcolm
20 served Purina with a demand letter, in accordance with M.G.L. c. 93A, § 9(3). The demand
21 letter explained and described the nature of the unfair or deceptive acts or practices, the injuries
22 suffered by the members of the Massachusetts Class and the Massachusetts Subclass, as well as
23 demanding compensation for those injuries and other relief.

24 439. Purina failed to tender a reasonable offer of relief in response to the demand
25 letter.

440. Pursuant to M.G.L. c. 93A, §§ 9(3) and 9(4), the Massachusetts Plaintiff and each of the members of the Massachusetts Class and the Massachusetts Subclass are entitled to recover their actual damages, as set forth above (or statutory damages of \$25, whichever is greater), double or treble their actual damages, plus their reasonable attorneys' fees and the costs of this action, and injunctive relief directing Purina to stop engaging in the unfair and deceptive acts and practices alleged herein.

COUNT 42

Asserted as to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass

(Breach of the Implied Warranty of Merchantability
M.G.L. c. 106 § 2-314)

441. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

442. The Massachusetts Plaintiff brings this claim on her own behalf and on behalf of the Massachusetts Class and the Massachusetts Subclass.

443. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass, as those terms are defined in the Massachusetts Uniform Commercial Code. Further, the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members constituted “buyers” as that term is defined in the Massachusetts Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Massachusetts Uniform Commercial Code.

444. As part of the sales to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass, Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled as the agreements may have required, and conform to the promises or affirmations of fact made on the containers or labels.

1 445. Purina breached the implied warranty of merchantability as to Beneful initially
2 because Beneful would not pass without objection in the trade under the contract description.
3 Specifically, dog food that contains Industrial Grade Glycols, which are not approved for use in
4 food, Mycotoxins, Lead, or Arsenic, and/or is unsafe for consumption for dogs and that is
5 highly likely to cause illness and death will not pass without objection in the trade under the
6 description of dog food. In addition, Purina breached the implied warranty as to Beneful,
7 because Beneful was not fit for the ordinary purpose for which it is used, safely feeding dogs.
8 Further, Purina breached the implied warranty of merchantability because Beneful was not
9 adequately labeled as the agreements might have required because it failed to warn of the
10 dangers of its consumption by dogs.

11 446. At the time of sale throughout the Class Period, Purina made promises and
12 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
13 for consumption by pets. Said representations included, but were not limited to, Beneful being
14 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
15 satisfaction would be guaranteed.

16 447. However, Purina breached the implied warranty of merchantability because
17 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
18 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
19 customers’ satisfaction was not guaranteed.

20 448. Within a reasonable time after the discovery of Purina’s breach, Massachusetts
21 Class and Subclass member Paul Malcolm gave notice of the breaches on behalf of himself, the
22 Massachusetts Class and the Massachusetts Subclass. Alternatively, this pleading constitutes
23 sufficient notice of breach. Alternatively, to the extent it is determined that notice of the
24 breaches was not given, Purina did not suffer any prejudice thereby.

25 449. As a proximate result of this breach of warranty by Purina, the Massachusetts
26 Plaintiff, the Massachusetts Class and the Massachusetts Subclass have been damaged in the
27

1 following ways: (a) the difference in value between the value of the Beneful as warranted (the
 2 full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
 3 would not have paid anything for it had they known it contained Industrial Grade Glycols,
 4 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c)
 5 for those whose pets died from eating Beneful, the value of the dogs; and (d) for those whose
 6 dogs died from eating Beneful, the cost of disposing of the dogs' remains.

7 **COUNT 43**

8 **Asserted as to the Massachusetts Plaintiff, the Massachusetts Class**
 9 **and the Massachusetts Subclass**
 10 **(Breach of Express Warranty**
 11 **M.G.L. c. 106 § 2-313)**

12 450. The Massachusetts Plaintiff incorporates herein all of the preceding and
 13 subsequent paragraphs as if fully set forth here verbatim.

14 451. The Massachusetts Plaintiff brings this claim on behalf of herself, the
 15 Massachusetts Class and the Massachusetts Subclass.

16 452. Purina constituted both a "merchant" and a "seller" in connection with its sale of
 17 Beneful to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts
 18 Subclass, as those terms are defined in the Massachusetts Uniform Commercial Code. Further,
 19 the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members
 20 constituted "buyers" as that term is defined in the Massachusetts Uniform Commercial Code.
 21 Beneful, itself, constituted "goods," as that term is defined in the Massachusetts Uniform
 22 Commercial Code.

23 453. Under section 2-313 of the Uniform Commercial Code, the statements on
 24 Purina's containers and labels created express warranties, including that Beneful was safe for
 25 consumption by pets. Said statements include, but are not limited to, Beneful being "healthy,"
 26 offering "great nutrition" to dogs, promoting "healthy growth" and that customers' satisfaction
 27 would be guaranteed.

1 454. The statements regarding Beneful described in detail above constituted
2 affirmations of fact and promises relating to Beneful that became part of the basis for the
3 bargain for the purchase of Beneful and created an express warranty that Beneful would
4 conform to those affirmations of fact and promises.

5 455. Likewise, the statements as described in detail above constituted descriptions of
6 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
7 express warranty that Beneful would conform to the description.

8 456. Beneful was not safe for pets to consume and caused pets to become ill and/or
9 die. The unsafe nature of the pet food constituted a breach of these express warranties.

10 457. The Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts
11 Subclass members were injured as a direct and proximate result of Purina's aforementioned
12 breaches as follows: (a) the difference in value between the value of the Beneful as warranted
13 (its full purchase price) and the value of the Beneful as actually delivered (\$0, because
14 consumers would not have paid anything for it had they known it contained Industrial Grade
15 Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of
16 Beneful; (c) for those whose dogs died from consumption of Beneful, the value of those dogs;
17 and (d) for those whose dogs died from consumption of Beneful, the cost of disposing of their
18 remains.

19 458. Within a reasonable time after the discovery of Purina's breaches,
20 Massachusetts Class and Subclass member Paul Malcolm gave notice of the breach on behalf
21 of the Massachusetts Class and the Massachusetts Subclass. Alternatively, this pleading
22 constitutes a sufficient notice of breach. Alternatively, to the extent it is determined that notice
23 of the breach was not given, Purina did not suffer any prejudice thereby.

24 459. The Massachusetts Plaintiff, the members of the Massachusetts Class and the
25 Massachusetts Subclass demand judgment against Purina for damages, as set forth above, plus
26 interest, costs and such additional relief as the Court may deem appropriate or to which the
27

Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members may be entitled.

COUNT 44

Asserted Against Purina on Behalf of the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))

460. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

461. The Massachusetts Plaintiff brings this claim on behalf of herself, the Massachusetts Class and the Massachusetts Subclass.

462. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

463. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

464. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

465. The Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

466. Pursuant to 15 U.S.C. § 2310(e), the Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts Subclass are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Massachusetts Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Massachusetts Class and Subclass member Paul Malcolm already gave the required notice on behalf of the Massachusetts Class and the Massachusetts Subclass by letter dated May 4, 2015.

467. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of

1 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
2 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
3 contract description as dog food, (c) was adequately contained, packaged and labeled as the
4 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
5 container and label. M.G.L. c. 106 § 2-314(d)(2) (a), (c), (e) and (f).

6 468. Purina is liable to the Massachusetts Plaintiff, the Massachusetts Class and the
7 Massachusetts Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied
8 warranty of merchantability.

9 469. Purina initially breached the implied warranty of merchantability as to
10 Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts
11 Subclass because Beneful was not fit for the ordinary purposes for which it is used—a safe,
12 healthy dog food. Specifically, Beneful contained Industrial Grade Glycols, which are not
13 approved for use in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary
14 purpose of providing safe, healthy dog food. In fact, Beneful has caused injury and death to
15 thousands of dogs.

16 470. Purina further breached its implied warranty of merchantability to the
17 Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts
18 Subclass because Beneful would not pass without objection in the trade under its contract
19 description as dog food, as it contained Industrial Grade Glycols, which are not approved for
20 use in food, Mycotoxins, Lead, or Arsenic.

21 471. Purina further breached its implied warranty of merchantability to the
22 Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts
23 Subclass because Beneful was not adequately contained, packaged, and labeled. The directions
24 and labeling that accompanied the Beneful dog food did not warn the Massachusetts Plaintiff,
25 the members of the Massachusetts Class and the Massachusetts Subclass of the dangers of
26 feeding Beneful to their dogs.
27

1 472. Purina finally breached its implied warranty of merchantability to the
2 Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts
3 Subclass because Beneful did not conform to the promises and affirmations of fact set forth on
4 its container and label, as described above. Specifically, Beneful did not constitute safe,
5 healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote
6 “healthy growth,” and customers’ satisfaction was not guaranteed.

7 473. Pursuant to 15 U.S.C. § 2310(d)(1), the Massachusetts Plaintiff, the members of
8 the Massachusetts Class and the Massachusetts Subclass are entitled to recover the following
9 damages proximately caused to them by Purina’s breach of the implied warranty of
10 merchantability: (1) the difference in value between the Beneful as warranted (the full purchase
11 price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid
12 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
13 Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets
14 died from eating Beneful, the value of the dogs; and (4) for those whose dogs died from eating
15 Beneful, the cost of disposing of the remains. In addition, pursuant to 15 U.S.C. § 2310(d) (2),
16 the Massachusetts Plaintiff, the members of the Massachusetts Class and the Massachusetts
17 Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses
18 (including attorneys’ fees based on actual time expended) determined by the Court to have been
19 reasonably incurred by the Massachusetts Plaintiff, the members of the Massachusetts Class
20 and the Massachusetts Subclass in connection with the commencement and prosecution of this
21 action.

COUNT 45**Asserted Against Purina on Behalf of the Massachusetts Plaintiff, the Massachusetts Class
and the Massachusetts Subclass
(Negligence)**

474. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

475. The Massachusetts Plaintiff brings this action on behalf of herself, the Massachusetts Class and the Massachusetts Subclass.

476. Purina owed a duty of care to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass to provide pet food that was safe for consumption by dogs, free from toxins with harmful effects.

477. Purina breached this duty by selling Beneful, which was not safe and contained Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of Beneful; and without adequately warning the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass of the dangers on Beneful's packaging. Such conduct by Purina was negligent in that Purina failed to act as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances.

478. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass, would not recognize the risk; and that consumption of Beneful by dogs would foreseeably result in injury and death to those dogs, constituting property damage to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass beyond and in addition to damage from buying the worthless Beneful.

479. As a proximate result of Purina's negligent acts alleged herein, the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass suffered

injury to property, specifically in the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 46

Asserted Against Purina on Behalf of the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass
(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

480. The Massachusetts Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

481. The Massachusetts Plaintiff brings this action on behalf of herself, the Massachusetts Class and the Massachusetts Subclass.

482. The Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members conferred a benefit on Purina in the form of the gross revenues Purina derived from the money they paid to purchase Beneful.

483. Purina had an appreciation or knowledge of the benefit conferred on it by the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members.

484. Purina accepted and retained the benefit in the amount of the gross revenues it derived from sales of Beneful to the Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass members.

485. Purina has thereby profited by retaining the benefit under circumstances which would make it unjust for Purina to be permitted to retain the benefit.

486. The Massachusetts Plaintiff, the Massachusetts Class and the Massachusetts Subclass are entitled to restitution of the entire amount Purina derived from its sales of Beneful to them.

H. MINNESOTA CAUSES OF ACTION

COUNT 47

Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass

(Violation of Minnesota Uniform Deceptive Trade Practices Act, M.S.A. § 325D.43, et seq).

487. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

488. This Count is brought by the Minnesota Plaintiff on behalf of herself, the Minnesota Class and the Minnesota Subclass.

489. Purina's conduct, as alleged herein, constituted deceptive trade practices in the course of its business in violation of M.S.A. § 325D.44, including the following types of conduct specified in § 325D.44,1:

- a) Representing that goods or services have characteristics, ingredients, uses or benefits that they do not have (§ 325D.44,1(5));
- b) Representing that goods are of a particular standard, quality or grade, if they are of another (§ 325D.44,1(7));
- c) Advertising goods or services with intent not to sell them as advertised (§ 325D.44,1(9)); and
- d) Engaging in conduct that creates a likelihood of confusion or misunderstanding (§ 325D.44, 1(13)).

490. Purina's deceptive practices (including conduct prohibited by the provisions cited in subparagraphs (a) through (d) above), as alleged in greater detail herein, include, but are not limited to: (a) its false and misleading statements, representations, and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful, including that Beneful offers "100% complete and balanced nutrition," that is "healthy" for dogs and that it promotes dogs' "healthy growth"; (b) its omissions, contrary to Purina's representations, that Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,

1 or Arsenic and therefore create confusion or misunderstanding; and (b) its omission that these
 2 substances caused the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
 3 members' dogs to become ill and in some cases die.

4 491. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
 5 members have been damaged by Purina's deceptive trade practices, and members of the
 6 Minnesota Class and the Minnesota Subclass are likely to be damaged by Purina's deceptive
 7 trade practices.

8 492. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
 9 members are entitled to an injunction directing Purina to: remove the false and misleading
 10 statements, representations, and depictions from its labeling, packaging, marketing, promotion
 11 and advertising for Beneful; issue corrective statements, including making full disclosure of
 12 Beneful's inclusion of Industrial Grade Glycols, which are not approved for use in food,
 13 Mycotoxins, Lead, or Arsenic; and otherwise cease engaging in the deceptive trade practices
 14 alleged herein.

15 **COUNT 48**

16 **Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass**

17 **(Violation of Minnesota Unfair Trade Practices Act, M.S.A. § 325D.09, et seq.)**

18 493. The Minnesota Plaintiff incorporates herein the allegations of all of the
 19 preceding and subsequent paragraphs as if fully set forth herein verbatim.

20 494. This Count is brought by the Minnesota Plaintiff on behalf of herself, the
 21 Minnesota Class and the Minnesota Subclass.

22 495. At all times relevant hereto, the Minnesota Plaintiff, the Minnesota Class and the
 23 Minnesota Subclass members were "persons" within the meaning of M.S.A. § 325D.10(a).

24 496. Purina's conduct, as alleged herein, constituted unlawful trade practices, in
 25 violation of M.S.A. § 325D.09, including conduct in violation of M.S.A. § 325D.13, in that, in
 26
 27

1 connection with the sale of Beneful, Purina knowingly misrepresented, directly or indirectly,
2 the true quality, ingredients and origin of Beneful.

3 497. Purina's unlawful trade practices (including conduct prohibited by § 325D.13),
4 as alleged in greater detail herein, include, but are not limited to: (a) its false and misleading
5 statements, representations, and depictions in its labeling, packaging, marketing, promotion and
6 advertising for Beneful, including representing that Beneful offers "100% complete and
7 balanced nutrition," that is "healthy" for dogs and that it promotes dogs' "healthy growth"; and
8 (b) the fact that, contrary to Purina's representations, Purina omitted that Beneful contained
9 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
10 Arsenic; and/or (c) that those substances caused the Minnesota Plaintiff, the Minnesota Class
11 and the Minnesota Subclass members' dogs to become ill and, in some cases, die.

12 498. As a result of Purina's unlawful trade practices, the Minnesota Plaintiff, the
13 Minnesota Class and the Minnesota Subclass members have suffered injury within the meaning
14 of M.S.A. § 325D.15, which they seek to recover, consisting of at least the following:

- 15 a) Veterinary bills incurred as a result of their dogs' illnesses or injuries
16 caused by consumption of Beneful;
- 17 b) The costs of disposing of their dogs killed by consumption of Beneful;
- 18 c) In cases resulting in death caused by consumption of Beneful, the value
19 of the dogs; and
- 20 d) The amounts they paid for Beneful: the difference between the value of
21 Beneful as represented (the purchase price) and the value of Beneful as
22 actually accepted and delivered (which was \$-0-, because of the unsafe
23 and hazardous nature of the product).

24 499. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
25 members are entitled to recover these actual damages and injunctive relief (to, among other
26
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1 things, direct Purina to cease its deceptive conduct, as alleged herein, and to issue corrective
2 statements and advertising) pursuant to M.S.A. § 325D.15.

3 500. Alternatively, the Minnesota Plaintiff, the Minnesota Class and the Minnesota
4 Subclass members are entitled to bring an action for damages under the Minnesota Private
5 Attorney General Statute, M.S.A. § 8.31, 3a, because this action has a public benefit. The
6 public benefit of this action is demonstrated by at least the following:

- 7 a) this action seeks injunctive relief in order to stop Purina from continuing
8 to engage in the unfair trade practices alleged herein, including to
9 eliminate Purina's false and misleading advertising and to direct it to
10 issue corrective statements and advertising, in an effort to protect
11 members of the Minnesota Class and the Minnesota Subclass and
12 members of the public;
- 13 b) this action seeks to address a pervasive problem with an unreasonably
14 dangerous product manufactured and sold by Purina, that is causing dogs
15 who eat it to get sick and die. Beneful is estimated to have caused the
16 death and injury of over 3,000 dogs during the last few years, including
17 the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
18 members' dogs. By bringing this action, the Minnesota Plaintiff hope to
19 prevent additional dogs from suffering the same fate from consumption
20 of Beneful;
- 21 c) the toxic and hazardous nature of Beneful has caught the attention of the
22 Association for Truth in Pet Food ("ATPF"), which has tested Beneful
23 and found it to contain high risk levels of Mycotoxins and bacteria and
24 has given Beneful a Risk Equivalent Quality Rating of 32, where
25 anything over 20 indicates a high risk; and
26
27

d) members of the public have been and are concerned about the risk to their dogs of consuming Beneful, as evidenced by, among other things, the thousands of complaints by dog owners about Beneful that can be found on the Internet and the hundreds of calls undersigned counsel have received from dog owners whose dogs have become ill and died from consuming Beneful.

COUNT 49

Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass (Violation of Minnesota Consumer Fraud Act, M.S.A. § 325F.68, *et seq.*)

501. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

502. This Count is brought by the Minnesota Plaintiff on behalf of herself, the Minnesota Class and the Minnesota Subclass.

503. At all times relevant hereto, Purina was a “person” within the meaning of M.S.A. § 325F.68(3).

504. Purina’s conduct, as alleged herein, constituted unlawful practices, in violation of M.S.A. § 325F.69,1, including fraud, false pretense, false promises, misrepresentations, misleading statements, and/or deceptive practices, with the intent that others rely thereon, in connection with the sale of Beneful to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members.

505. Purina’s unlawful practices (including fraud, misrepresentation, and deceptive practices prohibited by § 325F.69,1)), as alleged in greater detail herein, include, but are not limited to: (a) its false and misleading statements, representations, and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful, including representing that Beneful offers “100% complete and balanced nutrition,” that is “healthy” for dogs and that it promotes dogs’ “healthy growth”; (b) its omission that Beneful contained Industrial Grade

1 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic; and/or (c) its
2 omission that these substances caused the Minnesota Plaintiff, the Minnesota Class and the
3 Minnesota Subclass members' dogs to become ill and in some cases die.

4 506. As a result of Purina's fraud, misrepresentation and deceptive practices, the
5 Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members have suffered
6 injury within the meaning of M.S.A. § 8.31,3a, which they seek to recover, consisting of at
7 least the following:

- 8 a) Veterinary bills incurred as a result of their dogs' illnesses or injuries
9 caused by consumption of Beneful;
- 10 b) The costs of disposing of their dogs killed by consumption of Beneful;
- 11 c) In cases resulting in death caused by consumption of Beneful, the value
12 of the dogs; and
- 13 d) The amounts they paid for Beneful: the difference between the value of
14 Beneful as represented (the purchase price) and the value of Beneful as
15 actually accepted and delivered (which was \$-0-, because of the unsafe
16 and hazardous nature of the product).

17 507. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
18 members also seek injunctive relief pursuant to M.S.A. § 8.31,3a, directing Purina to cease the
19 unlawful practices alleged herein and to issue corrective statements and advertising.

20 508. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
21 members are entitled to bring an action for damages and injunctive under M.S.A. § 8.31, 3a,
22 because this action has a public benefit. The public benefit of this action is demonstrated by at
23 least the following:

- 24 a) this action seeks injunctive relief in order to stop Purina from continuing
25 to engage in the fraud, false pretense, false promises, misrepresentations,
26 misleading statements, and/or deceptive practices alleged herein, and to
27

1 issue corrective statements and advertising, in an effort to protect
2 members of the Minnesota Class and the Minnesota Subclass and
3 members of the public;

4 b) this action seeks to address a pervasive problem with an unreasonably
5 dangerous product manufactured and sold by Purina, that is causing dogs
6 who eat it to get sick and die. Beneful is estimated to have caused the
7 death and injury of over 3,000 dogs during the last few years, including
8 the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
9 members' dogs. By bringing this action, the Minnesota Plaintiff hope to
10 prevent additional dogs from suffering the same fate from consumption
11 of Beneful;

12 c) the toxic and hazardous nature of Beneful has caught the attention of the
13 Association for Truth in Pet Food ("ATPF"), which hastested Beneful
14 and found it to contain high risk levels of Mycotoxins and bacteria and
15 has given Beneful a Risk Equivalent Quality Rating of 32, where
16 anything over 20 indicates a high risk; and

17 d) members of the public have been and are concerned about the risk to
18 their dogs of consuming Beneful, as evidenced by, among other things,
19 the thousands of complaints by dog owners about Beneful that can be
20 found on the Internet and the hundreds of calls undersigned counsel have
21 received from dog owners whose dogs have become ill and died from
22 consuming Beneful.

COUNT 50**Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class
and the Minnesota Subclass****(Violation of Minnesota False Statement in Advertisement Act, M.S.A. § 325F.67)**

509. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

510. This Count is brought by the Minnesota Plaintiff on behalf of herself, the Minnesota Class and the Minnesota Subclass.

511. Purina's conduct, as alleged herein, constituted the making, dissemination or publishing of advertisements containing material assertions, representations or statements of fact that were untrue, deceptive or misleading, in connection with the promotion, marketing and sale of Beneful to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members, in violation of M.S.A. § 325F.67.

512. Purina's untrue, misleading and deceptive statements, as alleged in greater detail herein, include, but are not limited to: (a) its false and misleading statements, representations, and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful, including representing that Beneful offers "100% complete and balanced nutrition," that it is "healthy" for dogs and that it promotes dogs' "healthy growth"; and (b) the fact that, contrary to Purina's representations, Beneful was hazardous and toxic to dogs, containing Industrial Grade Glycol, Mycotoxins, Arsenic or Lead and caused the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members' dogs to become ill and in some cases die.

513. As a result of Purina's untrue, misleading and deceptive statements, the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members have suffered injury within the meaning of M.S.A. § 8.31,3a, which they seek to recover, consisting of at least the following:

- a) Veterinary bills incurred as a result of their dogs' illnesses or injuries caused by consumption of Beneful;

- b) The costs of disposing of their dogs killed by consumption of Beneful;
- c) In cases resulting in death caused by consumption of Beneful, the value of the dogs; and
- d) The amounts they paid for Beneful: the difference between the value of Beneful as represented (the purchase price) and the value of Beneful as actually accepted and delivered (which was \$-0-, because of the unsafe and hazardous nature of the product).

514. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members also seek injunctive relief pursuant to M.S.A. § 8.31,3a, directing Purina to stop making the untrue, misleading and deceptive statements alleged herein and to issue corrective statements and advertising.

515. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members are entitled to bring an action for damages and injunctive under M.S.A. § 8.31, 3a, because this action has a public benefit. The public benefit of this action is demonstrated by at least the following:

- a) this action seeks injunctive relief in order to stop Purina from continuing to make the untrue, misleading and deceptive statements alleged herein, and to issue corrective statements and advertising, in an effort to protect members of the Minnesota Class, the Minnesota Subclass and members of the public;
- b) this action seeks to address a pervasive problem with an unreasonably dangerous product manufactured and sold by Purina, that is causing dogs who eat it to get sick and die. Beneful is estimated to have caused the death and injury of over 3,000 dogs during the last few years, including the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members' dogs. By bringing this action, the Minnesota Plaintiff hope to

1 prevent additional dogs from suffering the same fate from consumption
2 of Beneful;

3 c) the toxic and hazardous nature of Beneful has caught the attention of the
4 Association for Truth in Pet Food (“ATPF”), which has tested Beneful
5 and found it to contain high risk levels of Mycotoxins and bacteria and
6 has given Beneful a Risk Equivalent Quality Rating of 32, where
7 anything over 20 indicates a high risk; and

8 d) members of the public have been and are concerned about the risk to
9 their dogs of consuming Beneful, as evidenced by, among other things,
10 the thousands of complaints by dog owners about Beneful that can be
11 found on the Internet and the hundreds of calls undersigned counsel have
12 received from dog owners whose dogs have become ill and died from
13 consuming Beneful.

14 **COUNT 51**

15 **Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class
16 and the Minnesota Subclass**

17 **(Breach of the Implied Warranty of Merchantability M.S.A. § 336.2-314)**

18 516. The Minnesota Plaintiff incorporates herein the allegations of all of the
19 preceding and subsequent paragraphs as if fully set forth here verbatim.

20 517. The Minnesota Plaintiff brings this claim on her own behalf and on behalf of the
21 Minnesota Class and the Minnesota Subclass.

22 518. Purina constituted both a “merchant” and a “seller” in connection with its sale of
23 Beneful to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass, as those
24 terms are defined in the Minnesota Uniform Commercial Code. Further, the Minnesota
25 Plaintiff, the Minnesota Class and the Minnesota Subclass members constituted “buyers” as
26 that term is defined in the Minnesota Uniform Commercial Code. Beneful, itself, constituted
27 “goods,” as that term is defined in the Minnesota Uniform Commercial Code.

1 519. As part of the sales to the Minnesota Plaintiff, the Minnesota Class and the
2 Minnesota Subclass, Purina impliedly warranted that Beneful was merchantable. Among other
3 things, to be merchantable, Beneful had to pass without objection in the trade under the
4 contract description, be fit for the ordinary purposes for which Beneful is used, be adequately
5 contained, packaged and labeled as the agreements may have required, and conform to the
6 promises or affirmations of fact made on the containers or labels.

7 520. Purina breached the implied warranty of merchantability as to Beneful initially
8 because Beneful would not pass without objection in the trade under the contract description.
9 Specifically, dog food that is unsafe for consumption for dogs and that is highly likely to cause
10 illness and death will not pass without objection in the trade under the description of dog food.
11 In addition, Purina breached the implied warranty as to Beneful, because Beneful was not fit
12 for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina breached the
13 implied warranty of merchantability because Beneful was not adequately labeled as the
14 agreements might have required because it failed to warn of the dangers of its consumption by
15 dogs.

16 521. At the time of sale throughout the Class Period, Purina made promises and
17 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
18 for consumption by pets. Said representations included, but were not limited to, Beneful being
19 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
20 satisfaction would be guaranteed.

21 522. However, Purina breached the implied warranty of merchantability because
22 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
23 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
24 customers’ satisfaction was not guaranteed.

25 523. Within a reasonable time after the discovery of Purina’s breaches, the Minnesota
26 Plaintiff gave notice of the breaches on behalf of herself, the Minnesota Class and the
27

1 Minnesota Subclass. Alternatively, this pleading constitutes sufficient notice of breach.
 2 Alternatively, notice was not required because Purina already had specific knowledge of its
 3 breaches of warranty as to the Minnesota Plaintiff, the Minnesota Class and the Minnesota
 4 Subclass.

5 524. As a proximate result of this breach of warranty by Purina, the Minnesota
 6 Plaintiff, the Minnesota Class and the Minnesota Subclass have been damaged in the following
 7 ways: (a) the difference in value between the value of the Beneful as warranted (the full
 8 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
 9 would not have paid anything for it had they known it contained Industrial Grade Glycols,
 10 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c)
 11 for those whose pets died from eating Beneful, the value of the dogs; and (d) for those whose
 12 dogs died from eating Beneful, the cost of disposing of the remains.

13 **COUNT 52**

14 **Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass**

15 **(Breach of Express Warranty M.S.A. § 336.2-313)**

16 525. The Minnesota Plaintiff incorporates herein all of the preceding and subsequent
 17 paragraphs as if fully set forth here verbatim.

18 526. The Minnesota Plaintiff brings this claim on behalf of herself and on behalf of
 19 the Minnesota Class and the Minnesota Subclass.

20 527. Purina constituted both a “merchant” and a “seller” in connection with its sale of
 21 Beneful to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass, as those
 22 terms are defined in the Minnesota Uniform Commercial Code. Further, the Minnesota
 23 Plaintiff, the Minnesota Class and the Minnesota Subclass members constituted “buyers” as
 24 that term is defined in the Minnesota Uniform Commercial Code. Beneful, itself, constituted
 25 “goods,” as that term is defined in the Minnesota Uniform Commercial Code.

26 528. Under section 2-313 of the Uniform Commercial Code, the statements on
 27 Purina’s containers and labels created express warranties, including that Beneful was safe for

1 consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,”
2 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
3 would be guaranteed.

4 529. The statements regarding Beneful described in detail above constituted
5 affirmations of fact and promises relating to Beneful that became part of the basis of the
6 bargain for the purchase of Beneful and created an express warranty that Beneful would
7 conform to those affirmations of fact and promises.

8 530. Likewise, the statements as described in detail above constituted descriptions of
9 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
10 express warranty that Beneful would conform to the description.

11 531. Beneful was not safe for pets to consume and caused pets to become ill and/or
12 die. The unsafe nature of the pet food constituted a breach of these express warranties.

13 532. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
14 members were injured as a direct and proximate result of Purina’s aforementioned breaches as
15 follows: (a) the difference in value between the value of the Beneful as warranted (its full
16 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
17 would not have paid anything for it had they known it contained Industrial Grade Glycols,
18 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful;
19 (c) for those whose dogs died from consumption of Beneful, the value of those dogs; and (d)
20 for those whose dogs died from consumption of Beneful, the cost of disposing of their remains.

21 533. Within a reasonable time after the discovery of Purina’s breaches, the Minnesota
22 Plaintiff gave notice of the breach on her own behalf and on behalf of the Minnesota Class and
23 the Minnesota Subclass. Alternatively, this pleading constitutes a sufficient notice of breach.
24 Alternatively, notice was not required because Purina already had specific knowledge of its
25 breaches of warranty as to the Minnesota Plaintiff, the Minnesota Class and the Minnesota
26 Subclass.

534. The Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass demand judgment against Purina for damages, as set forth above, plus interest, costs and such additional relief as the Court may deem appropriate or to which the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members may be entitled.

COUNT 53

Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass

(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. Seq. (“MMWA”))

535. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

536. The Minnesota Plaintiff brings this claim on behalf of herself, the Minnesota Class and the Minnesota Subclass.

537. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

538. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

539. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

540. The Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

541. Pursuant to 15 U.S.C. § 2310(e), the Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Minnesota Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Minnesota Plaintiff Porter already gave the required notice on behalf of herself, the Minnesota Class and the Minnesota Subclass by letter dated May 13, 2015.

1 542. In connection with its sale of Beneful, Purina gave an implied warranty as
2 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
3 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
4 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
5 contract description as dog food, (c) was adequately contained, packaged and labeled as the
6 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
7 container and label. M.S.A. § 336.2-314(2) (a), (c), (e) and (f).

8 543. Purina is liable to the Minnesota Plaintiff, the Minnesota Class and the
9 Minnesota Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied
10 warranty of merchantability.

11 544. Purina initially breached the implied warranty of merchantability as to the
12 Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass because
13 Beneful was not fit for the ordinary purposes for which it is used – a safe, healthy dog food.
14 Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in
15 food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing
16 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

17 545. Purina further breached its implied warranty of merchantability to the Minnesota
18 Plaintiff, the members of the Minnesota Class and the Minnesota Subclass because Beneful
19 would not pass without objection in the trade under its contract description as dog food, as it
20 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
21 or Arsenic.

22 546. Purina further breached its implied warranty of merchantability to the Minnesota
23 Plaintiff, the members of the Minnesota Class and the Minnesota Subclass because Beneful was
24 not adequately contained, packaged, and labeled. The directions and labeling that accompanied
25 the Beneful dog food did not warn the Minnesota Plaintiff, the members of the Minnesota Class
26 and the Minnesota Subclass of the dangers of feeding Beneful to their dogs.

547. Purina finally breached its implied warranty of merchantability to the Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass because Beneful did not conform to the promises and affirmations of fact set forth on its container and label, as described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’ satisfaction was not guaranteed.

548. Pursuant to 15 U.S.C. § 2310(d)(1), the Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass are entitled to recover the following damages proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1) the difference in value between Beneful as warranted (the full purchase price) and Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating Beneful, the value of the dogs; and (4) for those whose dogs died from eating Beneful, the cost of disposing of the remains. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have been reasonably incurred by the Minnesota Plaintiff, the members of the Minnesota Class and the Minnesota Subclass in connection with the commencement and prosecution of this action.

COUNT 54

Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass (Negligence)

549. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1 550. The Minnesota Plaintiff brings this action on behalf of herself, the Minnesota
2 Class and the Minnesota Subclass.

3 551. Purina owed a duty of care to the Minnesota Plaintiff, the Minnesota Class and
4 the Minnesota Subclass to provide pet food that was safe for consumption by dogs, free from
5 toxins with harmful effects.

6 552. Purina breached this duty by selling Beneful, which was not safe and contained
7 Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, without adequate quality control and
8 testing; without using proper manufacturing and production practices; without properly
9 investigating reports of pet deaths and illnesses following consumption of Beneful; and without
10 adequately warning the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
11 of the dangers on Beneful's packaging. Such conduct by Purina was negligent in that Purina
12 failed to act as an ordinarily prudent and reasonable person would have acted under the same or
13 similar circumstances.

14 553. Purina should have known that Beneful posed a risk of harm to dogs; that
15 purchasers of Beneful, including the Minnesota Plaintiff, the Minnesota Class and the
16 Minnesota Subclass, would not recognize the risk; and that consumption of Beneful by dogs
17 would foreseeably result in injury and death to those dogs, constituting property damage to the
18 Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass beyond and in addition to
19 the damages from buying the worthless Beneful.

20 554. As a proximate result of Purina's negligent acts alleged herein, the Minnesota
21 Plaintiff, the Minnesota Class and the Minnesota Subclass suffered injury to property,
22 specifically in the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 55**Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass
(Strict Product Liability)**

555. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

556. The Minnesota Plaintiff brings this action on behalf of herself, the Minnesota Class and the Minnesota Subclass.

557. Purina designed, manufactured and sold Beneful, which was unsafe because it contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

558. The existence of Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

559. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

560. Beneful came in sealed packages, and it and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

561. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass beyond and in addition to the damages caused by purchasing the worthless Beneful.

562. Accordingly, Purina is strictly liable for the damages caused to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass by the unreasonably dangerous Beneful, specifically the illness and deaths of their dogs and expenses incurred therewith.

COUNT 56**Asserted Against Purina on Behalf of the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass****(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

563. The Minnesota Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

564. The Minnesota Plaintiff brings this action on behalf of herself, the Minnesota Class and the Minnesota Subclass.

565. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members conferred a benefit on Purina in the form of the gross revenues it derived from their purchases of Beneful.

566. Purina had an appreciation or knowledge of the benefit conferred on it by the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members.

567. Purina knowingly accepted and retained the benefit in the amount of the gross revenues it earned from sales of Beneful to the Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members.

568. Purina has thereby profited by retaining the benefit under circumstances which would make it inequitable for Purina to be permitted to retain the benefit.

569. The Minnesota Plaintiff, the Minnesota Class and the Minnesota Subclass members are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to them.

I. MONTANA CAUSES OF ACTION**COUNT 57****Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class and the Montana Subclass****(Breach of Express Warranty)**

570. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

1 571. The Montana Plaintiff brings this action on behalf of himself, the Montana Class
2 and the Montana Subclass.

3 572. Purina constitutes a “merchant” and a “seller” in connection with its sales of
4 Beneful, as those terms are defined in the Montana Uniform Commercial Code. Further, the
5 Montana Plaintiff, the Montana Class and the Montana Subclass members constitute “buyers”
6 in connection with their purchases of Beneful from Purina, as that term is defined in the
7 Montana Uniform Commercial Code. Further, Beneful constitutes “goods,” as that term is
8 defined in the Montana Uniform Commercial Code. As these are consumer transactions, no
9 direct contractual relationship is required between Purina the Montana Class and the Montana
10 Subclass members.

11 573. By affirmations of fact, promises and descriptions made on Beneful’s packaging
12 and which relate to such goods, Purina provided Plaintiff, the members of the Montana Class
13 and the Montana Subclass with written express warranties before or at the time of purchase,
14 including the following:

- 15 t) “Satisfaction Guaranteed. If you’re not happy, we’re not happy.
16 Complete satisfaction or your money back....”
17 u) “At Purina, we’re unconditionally devoted to pets. We’ve dedicated
18 over 80 years to developing the high-quality products that satisfy the
19 needs of dogs and cats.”
20 v) “100% Complete and Balanced Nutrition”;
21 w) “Made with wholesome rice, real chicken, soy, and accented with
22 veggies and apples, it has the complete nutrition adult dogs need....”
23 x) “Healthy”
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1 574. These affirmations of facts and promises made by Purina to the Montana
2 Plaintiff, the Montana Class and the Montana Subclass members related to Beneful and became
3 part of the bases of the bargains between them and Purina and thereby created express
4 warranties that Beneful would conform to those affirmations and promises. Furthermore, the
5 aforementioned descriptions of Beneful were part of the bases of the bargains for the purchases
6 of Beneful between Purina and the Montana Plaintiff, the Montana Class and the Montana
7 Subclass members and they created an express warranty that the goods would conform to those
8 descriptions. As previously noted, because Beneful contained Industrial Grade Glycols, which
9 are not approved for use in food, Mycotoxins, Lead, or Arsenic, it did not conform to the
10 affirmations, promises and descriptions previously mentioned, resulting in breaches of express
11 warranties.

12 575. Beneful was marketed directly to consumers by Purina, came in sealed
13 packages, and did not change from the time it left Purina's possession until it was purchased by
14 consumers in stores.

15 576. The Montana Plaintiff has complied with all conditions precedent to filing this
16 breach of warranty claim, including providing timely notice of these breaches of warranty to
17 Purina on behalf of himself, the Montana Class and the Montana Subclass within a reasonable
18 time after discovering that Beneful might have proximately caused the damages described
19 herein. Such notice was reasonable based on the circumstances of this case, including the fact
20 Purina has engaged in a campaign to prevent other affected consumers from publicly discussing
21 similar claims while at the same time expressly denying any relationship between the
22 consumption of Beneful and the injuries here at issue. Alternatively, this pleading constitutes
23 adequate notice on behalf of the Montana Plaintiff, the Montana Class and the Montana
24 Subclass. Alternatively, notice need not have been given to Purina because it had actual notice
25 of its breaches of warranty as to the Montana Plaintiff, the Montana Class and the Montana
26 Subclass.

577. As a proximate result of Purina’s breach of express warranties, the Montana Plaintiff and the members of the Montana Class and the Montana Subclass have suffered actual damages as follows:

- a) the difference in value between the value of the Beneful as expressly warranted (the full purchase prices) and the value of the Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); i.e., the full purchase price of the Beneful;
 - b) the veterinarian bills incurred as a result of consumption of Beneful;
 - c) the market value of the dogs killed by consumption of Beneful; and
 - d) the cost of disposing of the remains of the dogs killed by consumption of Beneful.
- The Montana Plaintiff and members of the Montana Class and the Montana Subclass cannot return Beneful to Purina for repair as the subject defect is irreparable.

COUNT 58

Asserted as to the Montana Plaintiff, the Montana Class and the Montana Subclass
(Breach of the Implied Warranty of Merchantability, R.C.M. § 87A-2-314)

578. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

579. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Montana Plaintiff, the Montana Class and the Montana Subclass, as those terms are defined in the Montana Uniform Commercial Code. Further, the Montana Plaintiff, the Montana Class and the Montana Subclass members constituted “buyers” as that term is defined in the Montana Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Montana Uniform Commercial Code. Particularly as this is a consumer

1 transaction, no direct contractual relationship is required between the Montana Plaintiff, the
2 Montana Class, the Montana Subclass members and Purina.

3 580. As part of the sales to the Montana Plaintiff, the Montana Class and the
4 Montana Subclass, Purina impliedly warranted that Beneful was merchantable. Among other
5 things, to be merchantable, Beneful had to pass without objection in the trade under the
6 contract description, be fit for the ordinary purposes for which Beneful is used, be adequately
7 contained, packaged and labeled, and conform to the promises or affirmations of fact made on
8 the containers or labels.

9 581. Beneful breached the warranty of implied merchantability initially because it
10 would not pass without objection in the trade under the contract description. Specifically, dog
11 food that contains Industrial Grade Glycols, which are not approved for use in food,
12 Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description
13 of dog food, nor could such a defect reasonably be discovered by any reasonable form of
14 examination prior to use or consumption. In addition, Purina breached the implied warranty as
15 to Beneful, because Beneful was not fit for the ordinary purpose for which it is used, which is
16 safely feeding dogs. Further, Purina breached the implied warranty of merchantability because
17 Beneful was not adequately contained, packaged or labeled because it failed to warn of the
18 dangers of its consumption by dogs. The Montana Plaintiff, the Montana Class and the
19 Montana Subclass members' reasonable expectations as to the function of such products was
20 that they would not injure or kill their dogs once consumed, or would not contain or have a
21 probability, likelihood or tendency to contain Industrial Grade Glycols, which are not approved
22 for use in food, Mycotoxins, Lead, or Arsenic.

23 582. At the time of sale to the Montana Plaintiff, the Montana Class and the Montana
24 Subclass and throughout the Class Period, Purina made promises and affirmations of fact on the
25 packaging of Beneful to the effect that Beneful was safe for consumption by pets. Said
26 representations included, but were not limited to, Beneful being "healthy," offering "great
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1 nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be
2 guaranteed.

3 583. However, Purina breached the implied warranty of merchantability because
4 Beneful did not conform to those promises and affirmations of fact, in that Beneful was in fact
5 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
6 customers’ satisfaction was not guaranteed. For the reasons set forth above Beneful was
7 defective, such defects were present when Beneful left Purina’s control, and such defects
8 caused the Montana Plaintiff, the Montana Class and the Montana Subclass members' injuries.

9 584. Within a reasonable time after the discovery of Purina’s breach of the implied
10 warranty and the possible link of Beneful to the illness and death of their pet, the Montana
11 Plaintiff gave notice of such breaches on behalf of himself, the Montana Class and the Montana
12 Subclass. Alternatively, this pleading constitutes adequate notice on behalf of the Montana
13 Plaintiff, the Montana Class and the Montana Subclass. Alternatively, no notice was required
14 because Purina was already aware of its breaches as to the Montana Plaintiff, the Montana
15 Class and the Montana Subclass.

16 585. As a proximate result of this breach of implied warranty by Purina, the Montana
17 Plaintiff, the Montana Class and the Montana Subclass have been damaged in the following
18 manner: (a) by the difference in value between the value of the Beneful as warranted (the full
19 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
20 would not have paid anything for it had they known it contained Industrial Grade Glycols,
21 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c)
22 for those whose pets died from eating Beneful, the market value of the dogs; and (d) for those
23 whose dogs died from eating Beneful, the cost of disposing of the remains.

COUNT 59**Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class and the Montana Subclass****(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. (“MMWA”))**

586. The Montana Plaintiff and the Montana Class members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

587. The Montana Plaintiff brings this claim on behalf of himself, the Montana Class and the Montana Subclass.

588. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

589. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

590. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

591. The Montana Plaintiff, the members of the Montana Class and the Montana Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

592. Pursuant to 15 U.S.C. § 2310(e), the Montana Plaintiff, the members of the Montana Class and the Montana Subclass are entitled to bring this action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the Montana Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, the Montana Plaintiff already gave any required notice on behalf of himself, the Montana Class and the Montana Subclass by letter dated May 13, 2015.

593. In connection with its sale of Beneful, Purina gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its ordinary purpose as safe dog food, (b) would pass without objection in the trade under its

1 contract description as dog food, (c) was adequately contained, packaged and labeled, and (d)
2 conformed to the promises and affirmations of fact set forth on its container and label.

3 594. Purina is liable to the Montana Plaintiff, the Montana Class and the Montana
4 Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
5 merchantability.

6 595. Purina initially breached the implied warranty of merchantability as to the
7 Montana Plaintiff, the members of the Montana Class and the Montana Subclass because
8 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
9 Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in
10 food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing
11 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

12 596. Purina further breached its implied warranty of merchantability to the Montana
13 Plaintiff, the members of the Montana Class and the Montana Subclass because Beneful would
14 not pass without objection in the trade under its contract description as dog food, as it contained
15 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
16 Arsenic.

17 597. Purina further breached its implied warranty of merchantability to the Montana
18 Plaintiff, the members of the Montana Class and the Montana Subclass because Beneful was
19 not adequately contained, packaged, and labeled. The directions and labeling that accompanied
20 the Beneful dog food did not warn the Montana Plaintiff, the members of the Montana Class
21 and the Montana Subclass of the dangers of feeding Beneful to their dogs.

22 598. Purina further breached its implied warranty of merchantability to the Montana
23 Plaintiff, the members of the Montana Class and the Montana Subclass because Beneful did not
24 conform to the promises and affirmations of fact set forth on its container and label, as
25 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
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1 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
2 satisfaction was not guaranteed.

3 599. Pursuant to 15 U.S.C. § 2310(d)(1), the Montana Plaintiff, the members of the
4 Montana Class and the Montana Subclass are entitled to recover the following damages
5 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
6 the difference in value between the Beneful as warranted (the full purchase price) and the
7 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
8 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
9 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
10 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
11 the cost of disposing of the remains.

12 600. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Montana Plaintiff, the
13 members of the Montana Class and the Montana Subclass are entitled to recover a sum equal to
14 the aggregate amount of costs and expenses (including attorneys’ fees based on actual time
15 expended) determined by the Court to have been reasonably incurred by the Montana Plaintiff,
16 the members of the Montana Class and the Montana Subclass in connection with the
17 commencement and prosecution of this action.

18 **COUNT 60**

19 **Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class**
20 **and the Montana Subclass**
21 **(Negligence)**

22 601. The Montana Plaintiff and the Montana Class members incorporate by reference
23 each preceding and succeeding paragraph as though fully set forth at length herein.

24 602. Purina owed a duty of care to the Montana Plaintiff, the Montana Class and the
25 Montana Subclass to provide pet food that was safe for consumption by dogs, free from toxins
26 that could have harmful effects if consumed.
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603. Purina breached this duty by selling Beneful, which was not safe and contained that Industrial Grade Glycol, Mycotoxins, Arsenic or Lead, without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of Beneful; and without adequately warning the Montana Plaintiff, the Montana Class and the Montana Subclass of such dangers on Beneful's packaging. Such conduct by Purina was negligent in that Purina failed to act as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances.

604. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the Montana Plaintiff, the Montana Class and the Montana Subclass, would not recognize the risk; and that consumption of Beneful by dogs would foreseeably result in injury and death to those dogs, constituting property damage to the Montana Plaintiff, the Montana Class and the Montana Subclass beyond and in addition to their damages from purchasing the worthless Beneful.

605. As a proximate result of Purina's negligent acts alleged herein, the Montana Plaintiff, the Montana Class and the Montana Subclass suffered injury to property, specifically in the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 61
**Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class
and the Montana Subclass
(Strict Products Liability)**

606. The Montana Plaintiff, the Montana Class and the Montana Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

607. Purina designed, manufactured, distributed and sold Beneful, which was in an unsafe condition to the ultimate consumer of such products at time of sale because it contained toxins and had other harmful effects as alleged in the factual section above.

608. The existence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

609. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control and thus are directly traceable to Purina.

610. Beneful came in sealed packages, and both the product and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

611. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Montana Plaintiff, the Montana Class and the Montana Subclass beyond and in addition to their damages from purchasing the worthless Beneful.

612. Accordingly, Purina is strictly liable for the damages caused to the Montana Plaintiff, the Montana Class and the Montana Subclass by the consumption of the unreasonably dangerous Beneful, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 62

Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class and the Montana Subclass (Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

613. The Montana Plaintiff, the Montana Class and the Montana Subclass members incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

614. This claim in quasi-contract is based upon principles of restitution. A person who has been unjustly enriched at the expense of another is required to make restitution to the

1 other, and will restore to the person entitled thereto that which in equity and good conscience
2 belongs to another.

3 615. The Montana Plaintiff, the Montana Class and the Montana Subclass members
4 conferred a benefit on Purina by purchasing Beneful in the form of the gross revenues Purina
5 derived from such sales, which they would not have conferred had the true facts detailed above
6 been disclosed by Purina.

7 616. At the expense of the Montana Plaintiff, the Montana Class and the Montana
8 Subclass, Purina received, appreciated and accepted benefits in the form of the gross revenues
9 Purina derived from sales of Beneful to the Montana Plaintiff, the Montana Class members and
10 the Montana Subclass.

11 617. For the reasons detailed above, Purina has profited and accepted such benefits
12 under circumstances where it engaged in improper, deceitful or misleading conduct as set forth
13 above that would make it inequitable and unjust for Purina to retain such benefit without
14 repaying the value it received from the sales of such products.

15 618. The Montana Plaintiff, the Montana Class and the Montana Subclass members
16 are entitled to restitution of the entire amount Purina received from Purina's sales of Beneful to
17 them and thereby wrongfully obtained.

18 **COUNT 63**
19 **Asserted Against Purina on Behalf of the Montana Plaintiff, the Montana Class and the**
20 **Montana Subclass**
21 **(Violation of the Montana Unfair Trade Practices and Consumer Protection Act, M.C.A.**
22 **§ 30-14-101, et seq.)**

23 619. The Montana Plaintiff, the Montana Class and the Montana Subclass members
24 incorporate by reference each preceding and succeeding paragraph as though fully set forth at
25 length herein.

26 620. The Montana Plaintiff, the Montana Class and the Montana Subclass members
27 were actual purchasers and users of Beneful that was introduced into the stream of trade and
commerce, manufactured, distributed and sold by Purina throughout Montana and the United
States, who purchased such products primarily for personal, family or household purposes.

1 621. As set forth in detail above, Purina disseminated unhealthy and dangerous
2 Beneful dog food despite making numerous uniform material representations about the
3 guaranteed and healthy nature of the Product, and omitted and willfully failed to disclose
4 material facts to the contrary, including that Beneful contains Industrial Grade Glycols, which
5 are not approved for use in food, Mycotoxins, Lead, or Arsenic, despite having learned of the
6 potential presence of dangerous levels of ingredients and mycotoxins in the Beneful dog food
7 prior to such sales. In so doing, Purina engaged in and/or caused others to engage in deceptive
8 or unfair acts in the conduct of any trade or commerce, in violation of the Montana Unfair
9 Trade Practices and Consumer Protection Act.

10 622. These unfair or deceptive trade practices occurred in the course of Purina
11 conducting its business, trade or commerce, which included the advertising, offering for sale,
12 sale, or distribution of Beneful, directly or indirectly affecting the people of Montana.

13 623. The Montana Plaintiff, the Montana Class and the Montana Subclass members
14 would not have purchased Beneful products at the prices that they did, if at all, but for Purina's
15 wrongful failure to disclose Industrial Grade Glycols, which are not approved for use in food,
16 Mycotoxins, Lead, or Arsenic.

17 624. As a result of the commission of these unfair or deceptive trade practices and
18 failure to disclose the material omitted facts by Purina, the Montana Plaintiff, the Montana
19 Class and the Montana Subclass members were injured and suffered an ascertainable loss of
20 money or property. Based on the nature of the conduct of Purina as set forth above, they thus
21 are entitled to actual, treble or statutory damages or economic losses to the extent permitted by
22 law and in amounts to be determined at trial, which include (a) the difference in value between
23 the value of the Beneful as expressly warranted (the full purchase prices) and the value of the
24 Beneful as actually accepted and delivered (\$0, because it was unsafe and unfit for its ordinary
25 purpose and thus reduced or eliminated its value); i.e., the full purchase price of the Beneful;
26 (b) the veterinarian bills incurred as a result of consumption of Beneful; (c) the market value of
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the dogs killed by consumption of Beneful; and (d) the cost of disposing of the remains of the dogs killed by consumption of Beneful. They also seek fees, costs, and any other equitable relief the Court considers necessary or proper.

J. NEW JERSEY CAUSES OF ACTION

COUNT 64

Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass

(Violations of the New Jersey Consumer Fraud Act N.J. Stat. Ann. § 56:8-19)

625. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

626. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of the New Jersey Class and New Jersey Subclass.

627. Purina affirmatively misrepresented that Beneful was safe for consumption by pets. Said misrepresentations include, but are not limited to, misrepresentations on its packaging, such as Beneful being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed. Beneful was, in fact, unsafe for dogs, causing injury and death to thousands.

628. Purina’s claims were thus false, misleading, and/or deceptive.

629. Purina’s affirmative misrepresentations constituted an unconscionable commercial practice, deception, fraud, false promise, and/or misrepresentation as to the nature of the goods, in violation of the New Jersey Consumer Fraud Act.

630. Moreover, Purina failed to disclose that Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic.

631. This material omission also constituted a violation of the New Jersey Consumer Fraud Act.

632. The New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members suffered ascertainable losses caused by Purina’s misrepresentations and material

omissions because they paid the purchase price, or paid a price premium, due to the misleading and false advertising and deceptive promises of the safety of Beneful, when, in fact, Beneful was unsafe for pets to consume. Simply put, the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members paid for the represented benefits of Beneful and did not get what they paid for. Indeed, their purchases were of no value because Beneful was unsafe for their pets to consume. In addition, the New Jersey Plaintiff suffered ascertainable loss in the form of veterinarian bills, loss of the market value of her dog that died and the cost of disposing of the remains of her dog that died.

633. Beneful, which was designed, manufactured, advertised, marketed, and sold by Purina, is considered “merchandise” within the meaning of the New Jersey Consumer Fraud Act, and the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass are “persons” and “consumers” within the meaning of the New Jersey Consumer Fraud Act, such that they demand judgment against Purina for the statutory remedies made available under the New Jersey Consumer Fraud Act and such additional relief as the Court may deem appropriate or to which the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass may be entitled, pursuant to N.J.S.A. § 56:8-19.

634. More specifically, the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass are entitled to recover the following, among other possible relief: (1) the difference in value between the value of the Beneful as represented (the full purchase price) and the value of the Beneful as delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) all veterinarian bills resulting from their dogs’ consumption of Beneful; (3) to the extent their dogs died from consumption of Beneful, the market value of those animals; (4) to the extent their dogs died from consumption of Beneful, the cost of disposing of the remains; and (5) an injunction requiring Purina to recall all Beneful currently on the shelves and to stop selling Beneful unless and until the problems with its safety have been remedied.

1 635. New Jersey law also provides protection to purchasers of animal food from
2 unfair, deceptive and unconscionable practices. N.J. Stat. § 4:4-20.6 (Misbranding), N.J. Stat.
3 § 4:4-20.7 (Adulteration), and N.J. Stat. § 4:4-20.8 (Prohibited Acts).

4 636. A commercial feed is adulterated if it “bears or contains any poisonous or
5 deleterious substance which may render it injurious to health;” N.J. Stat. § 4:4-20.7, and a
6 commercial feed is misbranded if its “labeling is false or misleading in any particular.” N.J.
7 Stat. § 4:4-20.6. New Jersey law prohibits the “manufacture or distribution of any commercial
8 feed that is adulterated or misbranded.” N.J. Stat. § 4:4-20.8.

9 637. Beneful contains poisonous, deleterious or nonnutritive substances, which
10 injured the dogs of the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass
11 members, and the composition or quality of Beneful falls below what is purported or
12 represented by its label, as set forth above.

13 638. Purina’s conduct, as more fully described herein, violated N.J. Stat. §§ 4:4-20.6-
14 8. Violation of these laws, which are designed to protect consumers like the New Jersey
15 Plaintiff, the New Jersey Class and New Jersey Subclass, form an alternative basis for their
16 New Jersey Consumer Fraud Act claim.

17 639. Plaintiff and the other members of the New Jersey Class and New Jersey
18 Subclass further seek to enjoin such unlawful deceptive acts and practices as described above.
19 Each of the New Jersey Class members will be irreparably harmed unless the unlawful actions
20 of Purina are enjoined, in that Purina will continue to falsely and misleadingly market and
21 advertise and represent on its packaging the healthy nature of Beneful. Towards that end, the
22 New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass request an order granting
23 them injunctive relief requiring removal of the unsafe product from retail outlets, corrective
24 disclosures and/or disclaimers on the labeling and advertising of Beneful and/or the removal of
25 the harmful ingredients before sales resume.

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640. Absent injunctive relief, Purina will continue to manufacture and sell unsafe Beneful without warning to consumers of its harmful effects.

641. In this regard, Purina has violated, and continues to violate, the New Jersey Consumer Fraud Act, which makes deception, fraud, false promise, and/or misrepresentation of goods unlawful. As a direct and proximate result of Purina's violation of the New Jersey Consumer Fraud Act, as described above, the New Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass have suffered damages, as set forth above.

COUNT 65

**Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass
(Breach of Express Warranty
N.J. Stat. Ann. § 12A:2-313)**

642. The New Jersey Plaintiff incorporates herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

643. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of the New Jersey Class and New Jersey Subclass.

644. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass, as those terms are defined in the New Jersey Uniform Commercial Code. Further, the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members constituted “buyers” as that term is defined in the New Jersey Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the New Jersey Uniform Commercial Code.

645. Under section 2-313 of the Uniform Commercial Code, the statements on Purina's packaging created express warranties, including that Beneful was safe for consumption by pets. Said statements include, but are not limited to, Beneful being "healthy,"

1 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
2 would be guaranteed.

3 646. The statements regarding Beneful described in detail above constituted
4 affirmations of fact and promises relating to Beneful that became part of the basis for the
5 bargain for the purchase of Beneful and created an express warranty that Beneful would
6 conform to those affirmations of fact and promises.

7 647. Likewise, the statements as described in detail above constituted descriptions of
8 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
9 express warranty that Beneful would conform to the descriptions.

10 648. Beneful contained Industrial Grade Glycols, which are not approved for use in
11 food, Mycotoxins, Lead, or Arsenic, which constituted a breach of these express warranties.

12 649. The New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass
13 members were injured as a direct and proximate result of Purina’s aforementioned breaches as
14 follows: (a) by the difference in value between the value of the Beneful as warranted (its full
15 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
16 would not have paid anything for it had they known it contained Industrial Grade Glycols,
17 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their pets
18 consuming Beneful; (c) for those whose dogs died from consumption of Beneful, the market
19 value of those dogs; and (d) for those whose dogs died from consumption of Beneful, the cost
20 of disposing of their remains.

21 650. Within a reasonable time after the discovery of Purina’s breaches, the New
22 Jersey Plaintiff gave notice of the breach on her own behalf and on behalf of the New Jersey
23 Class and New Jersey Subclass. Alternatively, this pleading constitutes a sufficient notice of
24

1 breach. Alternatively, no notice was required because Purina specifically knew of its breaches
2 of warranty as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass.

3 651. The New Jersey Plaintiff, the members of the New Jersey Class and New Jersey
4 Subclass demand judgment against Purina for damages, as set forth above, plus interests, costs
5 and such additional relief as the Court may deem appropriate or to which the New Jersey
6 Plaintiff, the New Jersey Class and New Jersey Subclass members may be entitled.

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8 **COUNT 66**

9 **Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass**
10 **(Breach of the Implied Warranty of Merchantability**
11 **N.J. Stat. Ann. § 12A:2-314)**

12 652. The New Jersey Plaintiff incorporates herein the allegations of all of the
13 preceding and subsequent paragraphs as if fully set forth here verbatim.

14 653. The New Jersey Plaintiff brings this claim on behalf of herself, the New Jersey
15 Class and New Jersey Subclass.

16 654. Purina constituted both a “merchant” and a “seller” in connection with its sale of
17 Beneful to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass, as those
18 terms are defined in the New Jersey Uniform Commercial Code. Further, the New Jersey
19 Plaintiff and the New Jersey Class members constituted “buyers” as that term is defined in the
20 New Jersey Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is
21 defined in the New Jersey Uniform Commercial Code.

22 655. As part of the sales to the New Jersey Plaintiff, the New Jersey Class and New
23 Jersey Subclass, Purina impliedly warranted that Beneful was merchantable. Among other
24 things, to be merchantable, the Beneful had to pass without objection in the trade under the
25 contract description, be fit for the ordinary purposes for which Beneful is used, be adequately
26 contained, packaged and labeled as the agreements may have required, and conform to the
27 promises or affirmations of fact made on the containers or labels.

1 656. Beneful breached the warranty of implied merchantability initially because it
2 would not pass without objection in the trade under the contract description. Specifically, dog
3 food that contains Industrial Grade Glycols, which are not approved for use in food,
4 Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description
5 of dog food. In addition, Purina breached the implied warranty as to Beneful, because Beneful
6 was not fit for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina
7 breached the implied warranty of merchantability because Beneful was not adequately labeled
8 as the agreements might have required because it failed to warn of the dangers of its
9 consumption by dogs.

10 657. At the time of sale throughout the Class Period, Purina made promises and
11 affirmations of fact on the packaging of Beneful to the effect that Beneful was safe for
12 consumption by pets. Said representations included, but were not limited to, Beneful being
13 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
14 satisfaction would be guaranteed.

15 658. However, Purina breached the implied warranty of merchantability because
16 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
17 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
18 customers’ satisfaction was not guaranteed.

19 659. Within a reasonable time after the discovery of Purina’s breach, the New Jersey
20 Plaintiff gave notice of the breaches on behalf of herself, the New Jersey Class and New Jersey
21 Subclass. Alternatively, this pleading constitutes sufficient notice of breach. Alternatively, no
22 notice was required because Purina was already aware of its breaches as to the New Jersey
23 Plaintiff, the New Jersey Class and New Jersey Subclass.

24 660. As a proximate result of this breach of warranty by Purina, the New Jersey
25 Plaintiff, the New Jersey Class and New Jersey Subclass have been damaged in the following
26 manners: (a) by the difference in value between the value of the Beneful as warranted (the full
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purchase price) and the value of the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c) for those whose pets died from eating Beneful, the market value of the dogs; and (d) for those whose dogs died from eating Beneful, the cost of disposing of the remains.

COUNT 67

Asserted Against Purina on Behalf of the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass (Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))

661. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

662. The New Jersey Plaintiff brings this claim on behalf of herself, the New Jersey Class and New Jersey Subclass.

663. At all times relevant hereto, there was in full force and effect the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

664. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

665. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

666. The New Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its implied warranty.

667. Pursuant to 15 U.S.C. § 2310(e), the New Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass are entitled to bring this class action and are not required to give Purina notice and an opportunity to cure until such time as the Court determines the representative capacity of the New Jersey Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, New Jersey Plaintiff, Armstrong, already gave the

1 required notice on behalf of herself, the New Jersey Class and New Jersey Subclass by letter
2 dated May 15, 2015.

3 668. In connection with its sale of Beneful, Purina gave an implied warranty as
4 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
5 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
6 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
7 contract description as dog food, (c) was adequately contained, packaged and labeled as the
8 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
9 container and label.

10 669. Purina is liable to the New Jersey Plaintiff, the New Jersey Class and New
11 Jersey Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty
12 of merchantability.

13 670. Purina initially breached the implied warranty of merchantability as to the New
14 Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass because
15 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
16 Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in
17 food, Mycotoxins, Lead, or Arsenic which made it unfit for its ordinary purpose of providing
18 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

19 671. Purina further breached its implied warranty of merchantability to the New
20 Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass because
21 Beneful would not pass without objection in the trade under its contract description as dog
22 food, as it contained Industrial Grade Glycols, which are not approved for use in food,
23 Mycotoxins, Lead, or Arsenic.

24 672. Purina further breached its implied warranty of merchantability to the New
25 Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass because
26 Beneful was not adequately contained, packaged, and labeled. The directions and labeling that
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1 accompanied the Beneful dog food did not warn the New Jersey Plaintiff, the members of the
2 New Jersey Class and New Jersey Subclass of the dangers of feeding Beneful to their dogs.

3 673. Purina finally breached its implied warranty of merchantability to the New
4 Jersey Plaintiff, the members of the New Jersey Class and New Jersey Subclass because
5 Beneful did not conform to the promises and affirmations of fact set forth on its container and
6 label, as described above. Specifically, Beneful did not constitute safe, healthy food, was not
7 “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth,” and
8 customers’ satisfaction was not guaranteed.

9 674. Pursuant to 15 U.S.C. § 2310(d)(1), the New Jersey Plaintiff, the members of the
10 New Jersey Class and New Jersey Subclass are entitled to recover the following damages
11 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
12 the difference in value between the Beneful as warranted (the full purchase price) and the
13 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
14 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
15 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
16 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
17 the cost of disposing of the remains.

18 675. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the New Jersey Plaintiff, the
19 members of the New Jersey Class and New Jersey Subclass are entitled to recover a sum equal
20 to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time
21 expended) determined by the Court to have been reasonably incurred by the New Jersey
22 Plaintiff, the members of the New Jersey Class and New Jersey Subclass in connection with the
23 commencement and prosecution of this action.

COUNT 68**Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass
(Negligence)**

676. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

677. The New Jersey Plaintiff brings this action on behalf of herself and on behalf of the New Jersey Class and New Jersey Subclass.

678. Purina owed a duty of reasonable care to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass to provide pet food that was safe for consumption by dogs, free from toxins with harmful effects.

679. Purina breached this duty by selling Beneful, which contains harmful toxins, without adequate quality control and testing; without using proper manufacturing and production practices; without properly investigating reports of pet deaths and illnesses following consumption of Beneful; and without adequately warning the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass of Beneful's dangers on its packaging. Such conduct by Purina was negligent because it did not reflect the level of care that an ordinary person in Purina's place would have given.

680. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass, would not recognize the risk; and that consumption of Beneful by pets would foreseeably result in injury and death to dogs, constituting property damage to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass beyond and in addition to the damages from purchasing worthless Beneful.

681. As a proximate cause of Purina's negligent acts alleged herein, the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass suffered injury to property, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 69**Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass
(Products Liability
N.J. Stat. Ann. § 2A:58C-2)**

682. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

683. The New Jersey Plaintiff brings this action on her own behalf and on behalf of the New Jersey Class and New Jersey Subclass.

684. Purina manufactured Beneful which contained toxins and had other harmful effects as alleged, *supra*.

685. Beneful was not reasonably fit, suitable or safe for its intended purpose because it contained toxins and was otherwise designed and/or manufactured in a defective manner and failed to contain adequate warnings.

686. The existence of toxins and other harmful effects in Beneful, at all times material hereto, constituted an unreasonably dangerous defect and/or condition. Further, the failure to warn of the danger of Beneful on its packaging constituted an unreasonably dangerous defect and/or condition.

687. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

688. Beneful came in sealed packages, and it did not change from the time it left Purina's possession, through the time it arrived in stores to be sold to consumers and consumers bought and took possession of Beneful.

689. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, and related expenses, constituting property damage to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass beyond and in addition to the damages from purchasing the worthless Beneful.

690. Accordingly, Purina is strictly liable for these damages caused to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass by its unreasonably dangerous product.

COUNT 70

Asserted as to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass (Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)

691. The New Jersey Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

692. The New Jersey Plaintiff brings this claim on her own behalf and on behalf of the New Jersey Class and New Jersey Subclass.

693. The New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members conferred a benefit on Purina by purchasing Beneful in the form of the gross revenues Purina received from those sales.

694. Purina has been unjustly enriched by retaining the gross revenues derived from the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members' purchases of Beneful, which retention under these circumstances is unjust and inequitable.

695. Because Purina's retention of the revenue conferred on it by the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members is unjust and inequitable, Purina must pay it in restitution to the New Jersey Plaintiff, the New Jersey Class and New Jersey Subclass members.

K. NEW YORK CAUSES OF ACTION

COUNT 71

Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and the New York Subclass (Breach of Implied Warranty of Merchantability)

696. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1 697. The New York Plaintiffs brings this claim on their own behalves and on behalf
2 of the New York Class and the New York Subclass.

3 698. Purina constituted both a “merchant” and a “seller” in connection with its sale of
4 Beneful to the New York Plaintiffs, the New York Class and the New York Subclass, as those
5 terms are defined in the New York Uniform Commercial Code. Further, the New York
6 Plaintiffs, the New York Class and the New York Subclass members constituted “buyers” as
7 that term is defined in the New York Uniform Commercial Code. Beneful, itself, constituted
8 “goods,” as that term is defined in the New York Uniform Commercial Code.

9 699. As part of the sales to the New York Plaintiffs, the New York Class and the
10 New York Subclass, Purina impliedly warranted that Beneful was merchantable. Among other
11 things, to be merchantable, the Beneful had to pass without objection in the trade under the
12 contract description, be fit for the ordinary purposes for which Beneful is used, be adequately
13 contained, packaged and labeled as the agreements may have required, and conform to the
14 promises or affirmations of fact made on the containers or labels.

15 700. Beneful breached the warranty of implied merchantability initially because it
16 would not pass without objection in the trade under the contract description. Specifically, dog
17 food that contains Industrial Grade Glycols, which are not approved for use in food,
18 Mycotoxins, Lead, or Arsenic will not pass without objection in the trade under the description
19 of dog food. In addition, Purina breached the implied warranty as to Beneful, because Beneful
20 was not fit for the ordinary purpose for which it is used, safely feeding dogs. Further, Purina
21 breached the implied warranty of merchantability because Beneful was not adequately labeled
22 as the agreements might have required because it failed to warn of the dangers of its
23 consumption by dogs.

24 701. At the time of sale throughout the Class Period, Purina made promises and
25 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
26 for consumption by pets. Said representations included, but were not limited to, Beneful being
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1 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
2 satisfaction would be guaranteed.

3 702. However, Purina breached the implied warranty of merchantability because
4 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
5 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
6 customers’ satisfaction was not guaranteed.

7 703. Within a reasonable time after the discovery of Purina’s breach, the New York
8 Plaintiffs gave notice of the breaches on behalf of themselves, the New York Class and the
9 New York Subclass. Alternatively, this pleading constitutes sufficient notice of breach.
10 Alternatively, no notice was required because Purina specifically knew of its breaches of
11 warranty as to the New York Plaintiffs, the New York Class and the New York Subclass.

12 704. As a proximate result of this breach of warranty by Purina, the New York
13 Plaintiffs, the New York Class and the New York Subclass have been damaged in the
14 following manners: (a) by the difference in value between the value of the Beneful as
15 warranted (the full purchase price) and the value of the Beneful as actually delivered (\$0,
16 because consumers would not have paid anything for it had they known it contained Industrial
17 Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by
18 consumption of Beneful; (c) for those whose pets died from eating Beneful, the market value of
19 the dogs; and (d) for those whose dogs died from eating Beneful, the cost of disposing of the
20 remains.

21 **COUNT 72**

22 **Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class**
23 **and the New York Subclass**
24 **(Breach of Express Warranty)**

25 705. The New York Plaintiffs incorporates herein all of the preceding and subsequent
26 paragraphs as if fully set forth here verbatim.
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1 706. The New York Plaintiffs brings this claim on their own behalves and on behalf
2 of the New York Class and the New York Subclass.

3 707. Purina constituted both a “merchant” and a “seller” in connection with its sale of
4 Beneful to the New York Plaintiffs, the New York Class and the New York Subclass, as those
5 terms are defined in the New York Uniform Commercial Code. Further, the New York
6 Plaintiffs, the New York Class and the New York Subclass members constituted “buyers” as
7 that term is defined in the New York Uniform Commercial Code. Beneful, itself, constituted
8 “goods,” as that term is defined in the New York Uniform Commercial Code.

9 708. Under section 2-313 of the Uniform Commercial Code, the statements on
10 Purina’s packaging created express warranties, including that Beneful was safe for
11 consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,”
12 offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction
13 would be guaranteed.

14 709. The statements regarding Beneful described in detail above constituted
15 affirmations of fact and promises relating to Beneful that became part of the basis for the
16 bargain for the purchase of Beneful and created an express warranty that Beneful would
17 conform to those affirmations of fact and promises.

18 710. Likewise, the statements as described in detail above constituted descriptions of
19 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
20 express warranty that Beneful would conform to the descriptions.

21 711. Beneful contained Industrial Grade Glycols, which are not approved for use in
22 food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

23 712. The New York Plaintiffs, the New York Class and the New York Subclass
24 members were injured as a direct and proximate result of Purina’s aforementioned breaches as
25 follows: (a) by the difference in value between the value of the Beneful as warranted (its full
26 purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
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1 would not have paid anything for it had they known it contained Industrial Grade Glycols,
 2 Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their pets
 3 consuming Beneful; (c) for those whose dogs died from consumption of Beneful, the market
 4 value of those dogs; and (d) for those whose dogs died from consumption of Beneful, the cost
 5 of disposing of their remains.

6 713. Within a reasonable time after the discovery of Purina's breaches, the New York
 7 Plaintiffs gave notice of the breach on their own behalf and on behalf of the New York Class
 8 and the New York Subclass. Alternatively, this pleading constitutes a sufficient notice of
 9 breach. Alternatively, no notice was required because Purina specifically knew of its breaches
 10 of warranty as to the New York Plaintiffs, the New York Class and the New York Subclass.

11 714. The New York Plaintiffs, the members of the New York Class and the New
 12 York Subclass demand judgment against Purina for damages, as set forth above, plus interests,
 13 costs and such additional relief as the Court may deem appropriate or to which the New York
 14 Plaintiffs, the New York Class and the New York Subclass members may be entitled.

15 **COUNT 73**

16 **Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and the New York Subclass**

17 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. ("MMWA"))**

18 715. The New York Plaintiffs incorporates herein the allegations of all of the
 19 preceding and subsequent paragraphs as if fully set forth here verbatim.

20 716. The New York Plaintiffs brings this claim on behalf of themselves, the New
 21 York Class and the New York Subclass.

22 717. At all times relevant hereto, there was in full force and effect the Magnuson-
 23 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the "MMWA").

24 718. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

25 719. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).
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1 720. The New York Plaintiffs, the members of the New York Class and the New
2 York Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers
3 because they are persons entitled under applicable state law to enforce against the warrantor the
4 obligations of its implied warranty.

5 721. Pursuant to 15 U.S.C. § 2310(e), the New York Plaintiffs, the members of the
6 New York Class and the New York Subclass are entitled to bring this class action and are not
7 required to give Purina notice and an opportunity to cure until such time as the Court
8 determines the representative capacity of the New York Plaintiffs pursuant to Rule 23 of the
9 Federal Rules of Civil Procedure. However, New York Plaintiffs Normand already gave the
10 required notice on behalf of themselves, the New York Class and the New York Subclass by
11 letter dated May 22, 2015 and Plaintiff Hickey already gave the required notice on behalf of
12 themselves, the New York Class and the New York Subclass by letter dated May 28, 2015.

13 722. In connection with its sale of Beneful, Purina gave an implied warranty as
14 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
15 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
16 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
17 contract description as dog food, (c) was adequately contained, packaged and labeled as the
18 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
19 container and label.

20 723. Purina is liable to the New York Plaintiffs, the New York Class and the New
21 York Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
22 merchantability.

23 724. Purina initially breached the implied warranty of merchantability as to the New
24 York Plaintiffs, the members of the New York Class and the New York Subclass because
25 Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog food.
26 Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in
27

1 food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of providing
2 safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of dogs.

3 725. Purina further breached its implied warranty of merchantability to the New York
4 Plaintiff, the members of the New York Class and the New York Subclass because Beneful
5 would not pass without objection in the trade under its contract description as dog food, as it
6 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
7 or Arsenic.

8 726. Purina further breached its implied warranty of merchantability to the New York
9 Plaintiffs, the members of the New York Class and the New York Subclass because Beneful
10 was not adequately contained, packaged, and labeled. The directions and labeling that
11 accompanied the Beneful dog food did not warn the New York Plaintiffs, the members of the
12 New York Class and the New York Subclass of the dangers of feeding Beneful to their dogs.

13 727. Purina finally breached its implied warranty of merchantability to the New York
14 Plaintiffs, the members of the New York Class and the New York Subclass because Beneful
15 did not conform to the promises and affirmations of fact set forth on its container and label, as
16 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
17 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
18 satisfaction was not guaranteed.

19 728. Pursuant to 15 U.S.C. § 2310(d)(1), the New York Plaintiffs, the members of the
20 New York Class and the New York Subclass are entitled to recover the following damages
21 proximately caused to them by Purina’s breach of the implied warranty of merchantability: (1)
22 the difference in value between the Beneful as warranted (the full purchase price) and the
23 Beneful as actually delivered (\$0.00, because consumers would not have paid anything for it
24 had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
25 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
26
27

1 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
2 the cost of disposing of the remains.

3 729. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the New York Plaintiffs, the
4 members of the New York Class and the New York Subclass are entitled to recover a sum
5 equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual
6 time expended) determined by the Court to have been reasonably incurred by the New York
7 Plaintiffs, the members of the New York Class and the New York Subclass in connection with
8 the commencement and prosecution of this action.

9 **COUNT 74**

10 **Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and**
11 **the New York Subclass**
12 **(Negligence)**

13 730. The New York Plaintiffs incorporates herein the allegations of all of the
14 preceding and subsequent paragraphs as if fully set forth here verbatim.

15 731. The New York Plaintiffs brings this action on behalf of themselves and on
16 behalf of the New York Class and the New York Subclass.

17 732. Purina owed a duty of reasonable care to the New York Plaintiffs, the New York
18 Class and the New York Subclass to provide pet food that was safe for consumption by dogs,
19 free from toxins with harmful effects.

20 733. Purina breached this duty by selling Beneful, which contains harmful toxins,
21 without adequate quality control and testing; without using proper manufacturing and
22 production practices; without properly investigating reports of pet deaths and illnesses
23 following consumption of Beneful; and without adequately warning the New York Plaintiffs,
24 the New York Class and the New York Subclass of Beneful's dangers on its packaging. Such
25 conduct by Purina was negligent because it did not reflect the level of care that an ordinary
26 person in Purina's place would have given.
27

734. Purina should have known that Beneful posed a risk of harm to dogs; that purchasers of Beneful, including the New York Plaintiffs, the New York Class and the New York Subclass, would not recognize the risk; and that consumption of Beneful by pets would foreseeably result in injury and death to dogs, constituting property damage to the New York Plaintiffs, the New York Class and the New York Subclass beyond and in addition to the damages from purchasing the worthless Beneful.

735. As a proximate cause of Purina's negligent acts alleged herein, the New York Plaintiffs, the New York Class and the New York Subclass suffered injury to property, specifically the illness and deaths of their dogs and the expenses incurred therewith.

COUNT 75

**Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and
the New York Subclass
(Negligent Misrepresentation)**

736. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

737. Purina owed the New York Plaintiffs, the New York Class and the New York Subclass a duty to exercise reasonable care in representing the safety of Beneful.

738. Purina falsely represented that Beneful was safe for consumption by dogs. Purina also failed to disclose that Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic. Beneful was under a duty to make such disclosure because the affirmative representations that it made were incomplete and misleading without the further disclosure of the dangers of Beneful. Purina made the false representations and the failure to disclose in the course of its business and in connection with transactions in which it had a pecuniary interest.

739. In reality, Beneful caused dogs to become ill and, in many cases, to die.

740. The New York Plaintiffs, the New York Class and the New York Subclass members reasonably and justifiably relied on the information provided by Purina and on Purina's non-disclosure regarding the safety of Beneful.

741. As a proximate cause of Purina's false representations and omissions, Plaintiffs, the New York Class and the New York Subclass members suffered injury to property, specifically in the illness and deaths of their pets and the expenses incurred in connection therewith.

COUNT 76

**Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and the New York Subclass
(Strict Products Liability)**

742. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

743. The New York Plaintiffs brings this action on their own behalves, the New York Class and the New York Subclass.

744. Purina manufactured Beneful which contained toxins and had other harmful effects as alleged, *supra*.

745. Beneful was not reasonably fit, suitable or safe for its intended purpose because it contained toxins and was otherwise designed and/or manufactured in a defective manner and failed to contain adequate warnings.

746. The existence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful, at all times material hereto, constituted an unreasonably dangerous defect and/or condition. Further, the failure to warn of the danger of Baneful on its packaging constituted an unreasonably dangerous defect and/or condition.

747. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

748. Beneful came in sealed packages, and it did not change from the time it left Purina's possession, through the time it arrived in stores to be sold to consumers and consumers bought and took possession of Beneful.

749. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, and related expenses, constituting property damage to the New York Plaintiffs, the New York Class and the New York Subclass beyond and in addition to the damages from purchasing the worthless Beneful.

750. Accordingly, Purina is strictly liable for these damages caused to the New York Plaintiffs, the New York Class and the New York Subclass by its unreasonably dangerous product.

COUNT 77

Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class and the New York Subclass
(New York General Business Law (“GBL”) § 349 Deceptive Acts and Practices Unlawful)

751. The New York Plaintiffs incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

752. The New York Plaintiffs, the members of the New York Class and the New York Subclass are consumers who purchased Beneful, which was designed, manufactured, marketed and distributed by Purina. They bring this action pursuant to New York Business Law Section 349.

753. Purina has engaged in deceptive practices in the sale of Beneful to consumers, including: (1) false and misleading marketing and advertising, including false representations on Beneful's packaging concerning the safety and quality of Beneful, and (2) failing to disclose and/or concealing a known defect and risk, the dangers of Beneful.

754. Such actions and failures to act have caused direct, foreseeable and proximate damages to the New York Plaintiffs, the other members of the New York Class and the New York Subclass. Those damages include (a) the difference in value between the value of

1 Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted
2 and delivered (\$0, because consumers would not have paid anything for it had they known it
3 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills
4 incurred as a result of consumption of Beneful; (c) the market value of the dogs killed by
5 consumption of Beneful; and (d) the expenses incurred in disposing of the remains of the dogs
6 killed by consumption of Beneful.

7 755. New York law also provides protection to purchasers of animal food from
8 unfair, deceptive and unconscionable practices. N.Y. Agric. & Mkts. Law § 131
9 (Misbranding), N.Y. Agric. & Mkts. Law § 132 (Adulteration), and N.Y. Agric. & Mkts. Law §
10 133 (Prohibited Acts).

11 756. A commercial feed is adulterated if it “bears or contains any poisonous or
12 deleterious substance which may render it injurious to health” (N.Y. Agric. & Mkts. Law §
13 132) and a commercial feed is misbranded if its “labeling is false or misleading in any
14 particular.” N.Y. Agric. & Mkts. Law § 131. New York law prohibits the “manufacture or
15 distribution of any commercial feed that is adulterated or misbranded.” N.Y. Agric. & Mkts.
16 Law § 133.

17 757. Beneful contains poisonous, deleterious or nonnutritive substances, including
18 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
19 Arsenic, which Purina omitted from consumers. These substances injured the dogs of the New
20 York Plaintiffs and the New York Class members, and the composition or quality of Beneful
21 falls below what is purported or represented by its label, as set forth above.

22 758. Purina's conduct, as more fully described herein, violated N.Y. Agric. & Mkts.
23 Law § 131-133. Violations of these laws, which are designed to protect consumers like the
24 New York Plaintiffs, the New York Class and the New York Subclass, form an alternate basis
25 for their GBL § 349 claim.

26 759. Plaintiffs, the other members of the New York Class and the New York Subclass
27

1 further seek to enjoin such unlawful deceptive acts and practices as described above. Each of
 2 the New York Class members will be irreparably harmed unless the unlawful actions of the
 3 Purina are enjoined, in that Purina will continue to falsely and misleadingly market and
 4 advertise and represent on its packaging the healthy nature of Beneful, and omit that Beneful
 5 contains Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
 6 or Arsenic. Towards that end, the New York Plaintiffs, the New York Class and the New York
 7 Subclass request an order granting them injunctive relief requiring removal of unsafe product
 8 from retail outlets, corrective disclosures and/or disclaimers on the labeling and advertising of
 9 Beneful and/or the removal of the harmful ingredients before sales resume.

10 760. Absent injunctive relief, Purina will continue to manufacture and sell unsafe
 11 Beneful without warning to consumers of its harmful effects.

12 761. In this regard, Purina has violated, and continues to violate, section 349 of the
 13 New York General Business Law (GBL), which makes deceptive acts and practices unlawful.
 14 As a direct and proximate result of Purina's violation of GBL § 349 as described above, the
 15 New York Plaintiffs, the members of the New York Class and the New York Subclass have
 16 suffered damages as set forth above.

17 **COUNT 78**

18 **Asserted Against Purina on Behalf of the New York Plaintiffs, the New York Class** 19 **and the New York Subclass** **(Unjust Enrichment under New York Common Law)**

20 762. The New York Plaintiffs incorporates herein the allegations of all of the
 21 preceding and subsequent paragraphs as if fully set forth here verbatim.

22 763. As a result of Purina's deceptive, fraudulent, and misleading labeling,
 23 advertising, marketing, and sale of Beneful, Purina was enriched at the expense of the New
 24 York Plaintiffs, the New York Class and the New York Subclass members by the gross
 25 revenues it derived from their payment of the purchase prices for Beneful.

26 764. Under the circumstances, it would be against equity and good conscience to
 27

1 permit Purina to retain the gross revenues that it derived from the sale of Beneful to the New
 2 York Plaintiffs, the New York Class and the New York Subclass members in light of the fact
 3 that Beneful was unsafe. Thus, it would be unjust or inequitable for Purina to retain those gross
 4 revenues without restitution to the New York Plaintiffs and the New York Class members of
 5 those amounts.

6 **L. OHIO CAUSES OF ACTION**

7 **COUNT 79**

8 **Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass**

9 **(Violation of the Magnuson-Moss Warranty Act,** 10 **15 U.S.C. § 2301, et. seq. (“MMWA”))**

11 765. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
 12 subsequent paragraphs as if fully set forth here verbatim.

13 766. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the
 14 Ohio Subclass.

15 767. At all times relevant hereto, there was in full force and effect the Magnuson-
 16 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

17 768. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

18 769. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

19 770. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass are
 20 “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons
 21 entitled under applicable state law to enforce against the warrantor the obligations of its implied
 22 warranty.

23 771. Pursuant to 15 U.S.C. § 2310(e), the Ohio Plaintiff and the members of the Ohio
 24 Class are entitled to bring this class action and are not required to give Purina notice and an
 25 opportunity to cure until such time as the Court determines the representative capacity of the
 26 Ohio Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, Ohio
 27

1 Plaintiff Winters already gave the required notice on behalf of herself, the Ohio Class and the
2 Ohio Subclass by letter dated May 20, 2015.

3 772. In connection with its sale of Beneful, Purina gave an implied warranty as
4 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
5 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
6 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
7 contract description as dog food, (c) was adequately contained, packaged and labeled as the
8 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
9 container and label. Ohio Rev. Code § 1302.27.

10 773. Purina is liable to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass
11 pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
12 merchantability.

13 774. Purina initially breached the implied warranty of merchantability as to the Ohio
14 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful was not fit for
15 the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
16 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
17 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
18 fact, Beneful has caused injury and death to thousands of dogs.

19 775. Purina further breached its implied warranty of merchantability to the Ohio
20 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful would not pass
21 without objection in the trade under its contract description as dog food, as it contained
22 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
23 Arsenic.

24 776. Purina further breached its implied warranty of merchantability to the Ohio
25 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful was not
26 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
27

1 Beneful dog food did not warn the Ohio Plaintiff, the members of the Ohio Class and the Ohio
2 Subclass of the dangers of feeding Beneful to their dogs.

3 777. Purina finally breached its implied warranty of merchantability to the Ohio
4 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful did not
5 conform to the promises and affirmations of fact set forth on its container and label, as
6 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
7 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
8 satisfaction was not guaranteed.

9 778. Pursuant to 15 U.S.C. § 2310(d)(1), the Ohio Plaintiff, the members of the Ohio
10 Class and the Ohio Subclass are entitled to recover the following damages proximately caused
11 to them by Purina’s breach of the implied warranty of merchantability: (1) the difference in
12 value between the Beneful as warranted (the full purchase price) and the Beneful as actually
13 delivered (\$0.00, because consumers would not have paid anything for it had they known it
14 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the veterinarian bills
15 caused by consumption of Beneful; (3) for those whose pets died from eating Beneful, the
16 market value of the dogs; and (4) for those whose dogs died from eating Beneful, the cost of
17 disposing of the remains.

18 779. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Ohio Plaintiff, the members
19 of the Ohio Class and the Ohio Subclass are entitled to recover a sum equal to the aggregate
20 amount of costs and expenses (including attorneys’ fees based on actual time expended)
21 determined by the Court to have been reasonably incurred by the Ohio Plaintiff, the members
22 of the Ohio Class and the Ohio Subclass in connection with the commencement and
23 prosecution of this action.

COUNT 80**Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass
(Breach of Express Warranty
Ohio Rev. Code § 1302.26)**

780. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

781. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the Ohio Subclass.

782. Purina constituted both a “merchant” and a “seller,” as those terms are defined in Ohio Rev. Code § 1302.01(A)(4) & (5), in connection with its sale of Beneful to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass. Further, the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass constituted “buyers,” as that term is defined in Ohio Rev. Code § 1302.01(A)(1). Beneful, itself, constituted “goods,” as that term is defined in Ohio Rev. Code § 1302.01(A)(8).

783. The statements on Purina’s packaging for Beneful created express warranties, including that Beneful was safe for consumption by pets, under both common law and Ohio Rev. Code § 1302.26. Said statements include, but are not limited to, Beneful dog food being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

784. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those affirmations of fact and promises.

785. Likewise, the statements as described in detail above constituted descriptions of Beneful that became part of the basis of the bargain for the purchase of Beneful and created an express warranty that Beneful would conform to those descriptions.

786. Beneful contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

787. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass were injured as a proximate result of Purina's aforementioned breaches as follows: (a) in the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from consuming Beneful, the market value of those dogs; and (d) for those whose dogs died from consuming Beneful, the cost of disposing of their remains.

788. Within a reasonable time after their discovery of Purina's breaches, the Ohio Plaintiff gave notice of the breaches of the express warranties on behalf of herself, the Ohio Class and the Ohio Subclass. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not necessary for the Ohio Plaintiff, the Ohio Class and the Ohio Subclass members to give Purina notice of its breaches of the express warranties as to them because Purina already had actual notice of those breaches.

COUNT 81

Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass
Breach of the Implied Warranty of Merchantability
Ohio Rev. Code § 1302.27

789. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

790. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the Ohio Subclass.

791. Purina is a “seller” and “merchant” as to Beneful within the meaning of Ohio Rev. Code § 1302.01(A)(4) & (5). Purina designed, manufactured and sold Beneful, which constitutes “goods” within the meaning of Ohio Rev. Code § 1302.01 (A)(8). The Ohio

1 Plaintiff, the members of the Ohio Class and the Ohio Subclass constituted “buyers” within the
2 meaning of Ohio Rev. Code § 1302.01(A)(1). Consequently, pursuant to Ohio Rev. Code §
3 1302.27, Purina impliedly warranted that Beneful was merchantable, including that it: (a) was
4 fit for its ordinary purposes as safe, healthy dog food, (b) it could pass without objection in the
5 trade under its contract description as dog food, (c) was adequately contained, packaged, and
6 labeled as the agreements required, and (d) it conformed to the promises and affirmations of
7 fact set forth on its container and labels.

8 792. Beneful was sold in sealed packaging, and the defects existed when it left
9 Purina’s control.

10 793. When Purina designed, manufactured, distributed and sold Beneful, it knew the
11 purpose for which Beneful was intended, *i.e.*, that it would be consumed by dogs.

12 794. Purina initially breached the implied warranty of merchantability as to the Ohio
13 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful was not fit for
14 the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
15 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
16 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
17 fact, Beneful has caused injury and death to thousands of dogs.

18 795. Purina further breached its implied warranty of merchantability to the Ohio
19 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful would not pass
20 without objection in the trade under its contract description as dog food, as it contained
21 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
22 Arsenic.

23 796. Purina further breached its implied warranty of merchantability to the Ohio
24 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful was not
25 adequately contained, packaged, and labeled. The directions and labeling that accompanied
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27

1 Beneful did not warn the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass
2 of the dangers of feeding Beneful to their dogs.

3 797. Purina finally breached its implied warranty of merchantability to the Ohio
4 Plaintiff, the members of the Ohio Class and the Ohio Subclass because Beneful did not
5 conform to the promises and affirmations of fact set forth on its container and label, as
6 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
7 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
8 satisfaction was not guaranteed.

9 798. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass were
10 injured as a proximate result of Purina’s aforementioned breaches as follows: (a) in the amount
11 of the difference in value between the value of the Beneful as warranted (its full purchase
12 prices) and the Beneful as actually delivered (\$0, because consumers would not have paid
13 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
14 Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c) for
15 those whose dogs died from consuming Beneful, the market value of those dogs; (d) for those
16 whose dogs died from consuming Beneful, the cost of disposing of their remains; and (e) other
17 economic losses, including the increased risk of health problems in their pets.

18 799. Within a reasonable time after their discovery of Purina’s breaches, the Ohio
19 Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of
20 herself, the Ohio Class and the Ohio Subclass. Alternatively, this pleading constitutes a
21 sufficient notice of Purina’s breaches of the implied warranty of merchantability.
22 Alternatively, it was not necessary for the Ohio Plaintiff to give Purina already notice of its
23 breaches of the implied warranty of merchantability as to her, the Ohio Class and the Ohio
24 Subclass because Purina had actual notice of such breaches.

COUNT 82**Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass
(Violation of Ohio's Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 *et seq.*)**

800. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

801. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the Ohio Subclass.

802. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass are “consumers” as defined in Ohio Rev. Code § 1345.02.

803. The purpose of the Ohio Consumer Sales Practices Act (“CSPA”) is to protect consumers from suppliers who commit deceptive or unconscionable sales practices.

804. The Ohio Plaintiff, the Ohio Class and the Ohio Subclass members are consumers, and the transfer of Beneful to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass members is considered a “consumer transaction” within the meaning of the CSPA. *See* Ohio Rev. Code § 1345.01.

805. Ohio Rev. Code § 1345.02 declares unlawful any unfair or deceptive act or practice in connection with a consumer transaction. “It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to (A) Make any representations, claims, or assertions of fact, whether orally or in writing, which would cause a reasonable consumer to believe such statements are true, unless, at the time such representations, claims, or assertions are made, the supplier possesses or relies upon a reasonable basis in fact such as factual, objective, quantifiable, clinical or scientific data or other competent and reliable evidence which substantiates such representations, claims, or assertions of fact.” Ohio Adm. Code 109:4-3-10.

806. Although Ohio Adm. Code 109:4-3-10 provided Purina with prior notice that the conduct described therein was deceptive or unconscionable, Purina violated the CSPA by representing to the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass that Beneful constituted safe, healthy food, when Purina did not have a reasonable basis in fact such

1 as factual, objective, quantifiable, clinical or scientific data or other competent and reliable
 2 evidence, to substantiate representations, claims, or assertions that Beneful was “healthy,”
 3 offered “great nutrition” to dogs, and promoted “healthy growth.” Moreover, Purina omitted
 4 that Beneful contained Industrial Grade Glycols, which are not approved for use in food,
 5 Mycotoxins, Lead, or Arsenic.

6 807. Purina’s violations of the CSPA were the proximate cause of actual economic
 7 damages to the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass equal to:
 8 (a) the amount the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass paid
 9 for the worthless Beneful: the difference in value between the value of Beneful as represented
 10 (the full purchase prices) and the value of Beneful as actually accepted and delivered (\$0,
 11 because consumers would not have paid anything for it had they known it contained Industrial
 12 Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) their veterinarian bills incurred as a result of
 13 their pets consuming Beneful; (c) for those whose dogs died from eating Beneful, the market
 14 value of their dogs; and (d) for those whose dogs died from eating Beneful, the cost of
 15 disposing of their remains.

16 **COUNT 83**

17 **Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass** 18 **(Negligence Ohio Rev. Code § 2307.71, et seq.)**

19 808. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
 20 subsequent paragraphs as if fully set forth here verbatim.

21 809. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the
 22 Ohio Subclass.

23 810. Purina owed a duty of reasonable care to the Ohio Plaintiff, the members of the
 24 Ohio Class and the Ohio Subclass to provide dog food that was safe for consumption by dogs,
 25 free from excessive amounts of toxins with harmful effects.

26 811. Purina breached this duty by selling Beneful, which contained excessive
 27 amounts of harmful toxins, without adequate quality control and testing; without using proper
 manufacturing and production practices; without properly investigating reports of pet deaths

1 and illnesses following consumption of Beneful; and without adequately warning the Ohio
2 Plaintiff, the members of the Ohio Class and the Ohio Subclass of Beneful's dangers on its
3 packaging.

4 812. Such conduct by Purina was negligent because it did not reflect the level of care
5 that an ordinarily prudent and reasonable person in Purina's place would have given under the
6 same or similar circumstances.

7 813. Purina should have known that Beneful posed a risk of harm to dogs; that
8 purchasers of Beneful, including the Ohio Plaintiff, the members of the Ohio Class and the
9 Ohio Subclass, would not recognize the risk; and that consumption of Beneful by pets would
10 foreseeably result in their injury and death. Such injury and death to the dogs constituted
11 property damage to the Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass
12 beyond and in addition to their damage from purchasing the worthless Beneful.

13 814. As a proximate result of Purina's negligent acts alleged herein, the Ohio
14 Plaintiff, the members of the Ohio Class and the Ohio Subclass suffered injury to property,
15 specifically the illness and deaths of their dogs, and the expenses incurred therewith.

16 **COUNT 84**

17 **Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass**
18 **(Strict Products Liability Ohio Rev. Code § 2307.71, et seq.)**

19 815. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
20 subsequent paragraphs as if fully set forth here verbatim.

21 816. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the
22 Ohio Subclass.

23 817. Purina designed, manufactured, distributed and sold Beneful, which contained
24 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
25 Arsenic, as alleged, *supra*. The presence of Industrial Grade Glycols, Mycotoxins, Lead, or
26 Arsenic, and other harmful effects in Beneful, at all times material hereto, which would not
27 reasonably have been expected by consumers, constituted an unreasonably dangerous defect
and/or condition.

1 818. Beneful was unreasonably dangerous because of defects in marketing, design
2 and manufacturing, which reasonable consumers would not have expected.

3 819. There was a defect in the marketing of Beneful which made it unreasonably
4 dangerous because Purina failed to warn the Ohio Plaintiff, the members of the Ohio Class and
5 the Ohio Subclass, on its packaging or otherwise, of the potential harm to their dogs from
6 eating Beneful, which warning reasonable consumers would have expected.

7 820. Beneful was defectively designed because it contained Industrial Grade Glycols,
8 which are not approved for use in food, Mycotoxins, Lead, or Arsenic, there were substitute
9 ingredients available for Beneful that would meet the same needs and not be unsafe or
10 unreasonably expensive, Purina had the ability to eliminate the unsafe character of Beneful
11 without seriously impairing its usefulness or significantly increasing its costs, it was not
12 anticipated that purchasers of Beneful would be aware of the dangers inherent in the use of the
13 product, and the expectations of the ordinary consumer were that dog food manufactured by
14 Purina would be safe for dogs.

15 821. Alternatively, Beneful was defectively manufactured because it contained
16 excessive amounts of toxins or other ingredients that are harmful and deadly to dogs that
17 deviated in terms of quality from the specifications or planned output in a manner that rendered
18 it unreasonably dangerous and not within the expectations of reasonable consumers.

19 822. These unreasonably dangerous defects in the marketing, design and manufacture
20 of Beneful existed at the time the Beneful left Defendant's control.

21 823. Beneful came in sealed packages, and it did not change from the time it left
22 Purina's possession, through the time it arrived in stores to be sold to consumers and consumers
23 bought and took possession of it.

24 824. The unreasonably dangerous defects and/or conditions of Beneful proximately
25 caused injury and death to dogs, and related expenses, constituting property damage to the Ohio
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1 Plaintiff, the members of the Ohio Class and the Ohio Subclass beyond and in addition to their
2 damages from purchasing the worthless Beneful.

3 825. Accordingly, Purina is strictly liable for these damages caused to the Ohio
4 Plaintiff, the members of the Ohio Class and the Ohio Subclass by its unreasonably dangerous
5 product.

6 **COUNT 85**
7 **Asserted as to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass**
8 **(Unjust Enrichment/Restitution/Assumpsit/Money Had and Received)**

9 826. The Ohio Plaintiff incorporates herein the allegations of all of the preceding and
10 subsequent paragraphs as if fully set forth here verbatim.

11 827. The Ohio Plaintiff brings this claim on behalf of herself, the Ohio Class and the
12 Ohio Subclass.

13 828. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass
14 purchased Beneful, which was defective, not merchantable, and unreasonably dangerous and
15 therefore had no value to them.

16 829. The Ohio Plaintiff, the members of the Ohio Class and the Ohio Subclass
17 purchased Beneful designed, manufactured and marketed by Purina in various retail stores.
18 Purina knowingly received and retained a benefit from the Ohio Plaintiff, the Ohio Class
19 members and the Ohio Subclass, the gross revenues resulting from their purchases. Purina is
20 not justified in retaining these revenues because of the diminished value, inherent defects,
21 adulterated state, misbranded content and general lack of merchantability of Beneful.

22 830. Principles of fairness and equity demand that Purina disgorge the above-
23 referenced revenues to the Ohio Plaintiff, the Ohio Class and the Ohio Subclass members.
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M. PENNSYLVANIA CAUSES OF ACTION

COUNT 86

**Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class
and the Pennsylvania Subclass**

**(Violation of Pennsylvania Unfair Trade Practices & Consumer Protection Law, 73 P.S. §
201-1, et seq.)**

831. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth herein verbatim.

832. This Count is brought by the Pennsylvania Plaintiffs on behalf of themselves the Pennsylvania Class and the Pennsylvania Subclass.

833. At all times relevant hereto, the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members were “persons” within the meaning of 73 P.S. § 201-2(3)..

834. Purina’s conduct, as alleged herein, constituted unfair or deceptive acts or practices and unfair methods of competition in trade or commerce (within the meaning of 73 P.S. § 201-2(4)), in violation of 73 P.S. § 201-3, and regulations promulgated thereunder, including the following types of conduct specified in 73 P.S. § 201-2:

- a) Representing that goods or services have characteristics or ingredients that they do not have (§ 201-2(vi));
- b) Representing that goods are of a particular standard, quality or grade, if they are of another (§ 201-2(vii));
- c) Advertising goods or services with intent not to sell them as advertised (§ 201-2(ix));
- d) Failing to comply with the terms of a written guaranty or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made (§ 201-2(xiv)); and
- e) Engaging in fraudulent or deceptive conduct that creates a likelihood of confusion or misunderstanding (§ 201-2(xxi)).

1 835. Purina’s unfair and deceptive acts and practices (including conduct prohibited
2 by the provisions cited in subparagraphs (a) through (e) above), as alleged in greater detail
3 herein, include, but are not limited to: (a) its false and misleading statements, representations,
4 and depictions in its labeling, packaging, marketing, promotion and advertising for Beneful,
5 including representing that Beneful offers “100% complete and balanced nutrition,” that is
6 “healthy” for dogs and that it promotes dogs’ “healthy growth”; (b) the fact that, contrary to
7 Purina’s representations, Purina omitted that Beneful contained Industrial Grade Glycols,
8 which are not approved for use in food, Mycotoxins, Lead, or Arsenic, leading to confusion or
9 misunderstanding; and (d) that these substances caused the Pennsylvania Plaintiffs, the
10 Pennsylvania Class and the Pennsylvania Subclass members’ dogs to become ill and, in some
11 cases, die; and (c) and its breaches of the implied warranty of merchantability and its express
12 warranties.

13 836. As a result of Purina’s unfair and deceptive acts and practices, the Pennsylvania
14 Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members have suffered
15 ascertainable losses of money or property within the meaning of 73 P.S. § 201-9.2, which they
16 seek to recover, consisting of at least the following:

- 17 a) Veterinary bills incurred as a result of their dogs’ illnesses or injuries
18 caused by consumption of Beneful;
- 19 b) The costs of disposing of the remains of their dogs killed by
20 consumption of Beneful;
- 21 c) The values of their dogs killed by consumption of Beneful; and
- 22 d) The amounts they paid for Beneful: the difference between the value of
23 Beneful as represented (the purchase price) and the value of Beneful as
24 actually accepted and delivered (which was \$-0-, because of the unsafe
25 and hazardous nature of the product).

837. The Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members are entitled to recover these actual damages or statutory damages of \$100, whichever is greater, plus multiple damages.

COUNT 87

**Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class and
the Pennsylvania Subclass
(Breach of the Implied Warranty of Merchantability, 13 Pa. C.S.A. § 2314)**

838. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

839. The Pennsylvania Plaintiffs bring this claim on their own behalves and on behalf of the Pennsylvania Class and the Pennsylvania Subclass.

840. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass, as those terms are defined in the Pennsylvania Uniform Commercial Code. Further, the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members constituted “buyers” as that term is defined in the Pennsylvania Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Pennsylvania Uniform Commercial Code.

841. As part of the sales to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass Purina impliedly warranted that Beneful was merchantable. Among other things, to be merchantable, Beneful had to pass without objection in the trade under the contract description, be fit for the ordinary purposes for which Beneful is used, be adequately contained, packaged and labeled as the agreements may have required, and conform to the promises or affirmations of fact made on the containers or labels.

842. Purina breached the warranty of implied merchantability as to Beneful initially because Beneful would not pass without objection in the trade under the contract description. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use in

1 food, Mycotoxins, Lead, or Arsenic. Dog food that is unsafe for consumption for dogs and that
2 is highly likely to cause illness and death will not pass without objection in the trade under the
3 description of dog food. In addition, Purina breached the implied warranty as to Beneful,
4 because Beneful was not fit for the ordinary purpose for which it is used, safely feeding dogs.
5 Further, Purina breached the implied warranty of merchantability because Beneful was not
6 adequately labeled as the agreements might have required because it failed to warn of the
7 dangers of its consumption by dogs.

8 843. At the time of sale throughout the Class Period, Purina made promises and
9 affirmations of fact on the containers and labels of Beneful to the effect that Beneful was safe
10 for consumption by pets. Said representations included, but were not limited to, Beneful being
11 “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’
12 satisfaction would be guaranteed.

13 844. However, Purina breached the implied warranty of merchantability because
14 Beneful did not conform to those promises and affirmations of fact in that Beneful was in fact
15 not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy growth” and
16 customers’ satisfaction was not guaranteed.

17 845. Within a reasonable time after the discovery of Purina’s breach, the
18 Pennsylvania Plaintiffs gave notice of the breaches on behalf of themselves, the Pennsylvania
19 Class and the Pennsylvania Subclass. Alternatively, this pleading constitutes sufficient notice
20 of breach. Alternatively, notice was not required because Purina already had specific
21 knowledge of its breaches of warranty as to the Pennsylvania Plaintiffs, the Pennsylvania Class
22 and the Pennsylvania Subclass.

23 846. As a proximate result of this breach of warranty by Purina, the Pennsylvania
24 Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass have been damaged in the
25 following ways: (a) the difference in value between the value of the Beneful as warranted (the
26 full purchase price) and the value of the Beneful as actually delivered (\$0, because consumers
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would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of Beneful; (c) for those whose pets died from eating Beneful, the value of the dogs; and (d) for those whose dogs died from eating Beneful, the cost of disposing of the remains.

COUNT 88

Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass (Breach of Express Warranty 13 Pa. C.S.A. § 2313)

847. The Pennsylvania Plaintiffs incorporate herein all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

848. The Pennsylvania Plaintiffs bring this claim on behalf of themselves on behalf of the Pennsylvania Class and the Pennsylvania Subclass.

849. Purina constituted both a “merchant” and a “seller” in connection with its sale of Beneful to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass, as those terms are defined in the Pennsylvania Uniform Commercial Code. Further, the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members constituted “buyers” as that term is defined in the Pennsylvania Uniform Commercial Code. Beneful, itself, constituted “goods,” as that term is defined in the Pennsylvania Uniform Commercial Code.

850. Under section 2-313 of the Uniform Commercial Code, the statements on Purina’s containers and labels created express warranties, including that Beneful was safe for consumption by pets. Said statements include, but are not limited to, Beneful being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that customers’ satisfaction would be guaranteed.

851. The statements regarding Beneful described in detail above constituted affirmations of fact and promises relating to Beneful that became part of the basis for the

1 bargain for the purchase of Beneful and created an express warranty that Beneful would
2 conform to those affirmations of fact and promises.

3 852. Likewise, the statements as described in detail above constituted descriptions of
4 Beneful that became part of the basis of the bargain for the purchase of Beneful that created an
5 express warranty that Beneful would conform to the descriptions.

6 853. Beneful was not safe for pets to consume and caused pets to become ill and/or
7 die. The unsafe nature of the pet food constituted a breach of these express warranties.

8 854. The Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania
9 Subclass members were injured as a direct and proximate result of Purina's aforementioned
10 breaches as follows: (a) the difference in value between the value of the Beneful as warranted
11 (its full purchase price) and the value of the Beneful as actually delivered (\$0, because
12 consumers would not have paid anything for it had they known it contained Industrial Grade
13 Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills caused by consumption of
14 Beneful; (c) for those whose dogs died from consumption of Beneful, the value of those dogs;
15 and (d) for those whose dogs died from consumption of Beneful, the cost of disposing of their
16 remains.

17 855. Within a reasonable time after the discovery of Purina's breaches, the
18 Pennsylvania Plaintiffs gave notice of the breaches on their own behalves and on behalf of the
19 Pennsylvania Class and the Pennsylvania Subclass. Alternatively, this pleading constitutes a
20 sufficient notice of breach. Alternatively, notice was not required because Purina already had
21 specific knowledge of its breaches of warranty as to the Pennsylvania Plaintiffs, the
22 Pennsylvania Class and the Pennsylvania Subclass.

23 856. The Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the
24 Pennsylvania Subclass demand judgment against Purina for damages, as set forth above, plus
25 interest, costs and such additional relief as the Court may deem appropriate or to which the
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1 Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members may
2 be entitled.

COUNT 89
Asserted Against Purina on Behalf of the Pennsylvania
Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass
(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. Seq. (“MMWA”))

5 857. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the
6 preceding and subsequent paragraphs as if fully set forth here verbatim.

7 858. The Pennsylvania Plaintiffs bring this claim on behalf of themselves the
8 Pennsylvania Class and the Pennsylvania Subclass.

9 859. At all times relevant hereto, there was in full force and effect the Magnuson-
10 Moss Warranty Act, 15 U.S.C. § 2301, et seq. (the “MMWA”).

11 860. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

12 861. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

13 862. The Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the
14 Pennsylvania Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are
15 consumers because they are persons entitled under applicable state law to enforce against the
16 warrantor the obligations of its implied warranty.

17 863. Pursuant to 15 U.S.C. § 2310(e), the Pennsylvania Plaintiffs, the members of the
18 Pennsylvania Class and the Pennsylvania Subclass are entitled to bring this class action and are
19 not required to give Purina notice and an opportunity to cure until such time as the Court
20 determines the representative capacity of the Pennsylvania Plaintiffs pursuant to Rule 23 of the
21 Federal Rules of Civil Procedure. However, the Pennsylvania Plaintiffs already gave the
22 required notice on behalf of themselves the Pennsylvania Class and the Pennsylvania Subclass
23 by letters dated May 13, 2015.

24 864. In connection with its sale of Beneful, Purina gave an implied warranty as
25 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
26 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
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1 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
2 contract description as dog food, (c) was adequately contained, packaged and labeled as the
3 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
4 container and label. 13 Pa. C.S.A. § 2314(b)(1), (3), (5) and (6).

5 865. Purina is liable to the Pennsylvania Plaintiffs, the Pennsylvania Class and the
6 Pennsylvania Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied
7 warranty of merchantability.

8 866. Purina initially breached the implied warranty of merchantability as to the
9 Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the Pennsylvania Subclass
10 because Beneful was not fit for the ordinary purposes for which it is used – a safe, healthy dog
11 food. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use
12 in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of
13 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
14 dogs.

15 867. Purina further breached its implied warranty of merchantability to the
16 Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the Pennsylvania Subclass
17 because Beneful would not pass without objection in the trade under its contract description as
18 dog food, as it contained Industrial Grade Glycols, which are not approved for use in food,
19 Mycotoxins, Lead, or Arsenic.

20 868. Purina further breached its implied warranty of merchantability to the
21 Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the Pennsylvania Subclass
22 because Beneful was not adequately contained, packaged, and labeled. The directions and
23 labeling that accompanied the Beneful dog food did not warn the Pennsylvania Plaintiffs, the
24 members of the Pennsylvania Class and the Pennsylvania Subclass of the dangers of feeding
25 Beneful to their dogs.

1 869. Purina finally breached its implied warranty of merchantability to the
2 Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the Pennsylvania Subclass
3 because Beneful did not conform to the promises and affirmations of fact set forth on its
4 container and label, as described above. Specifically, Beneful did not constitute safe, healthy
5 food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy
6 growth,” and customers’ satisfaction was not guaranteed.

7 870. Pursuant to 15 U.S.C. § 2310(d)(1), the Pennsylvania Plaintiffs, the members of
8 the Pennsylvania Class and the Pennsylvania Subclass are entitled to recover the following
9 damages proximately caused to them by Purina’s breach of the implied warranty of
10 merchantability: (1) the difference in value between Beneful as warranted (the full purchase
11 price) and Beneful as actually delivered (\$0.00, because consumers would not have paid
12 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
13 Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets
14 died from eating Beneful, the value of the dogs; and (4) for those whose dogs died from eating
15 Beneful, the cost of disposing of the remains. In addition, pursuant to 15 U.S.C. § 2310(d)(2),
16 the Pennsylvania Plaintiffs, the members of the Pennsylvania Class and the Pennsylvania
17 Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses
18 (including attorneys’ fees based on actual time expended) determined by the Court to have been
19 reasonably incurred by the Pennsylvania Plaintiffs, the members of the Pennsylvania Class and
20 the Pennsylvania Subclass in connection with the commencement and prosecution of this
21 action.

22 **COUNT 90**

23 **Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class**
24 **and the Pennsylvania Subclass**
25 **(Negligence)**

26 871. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the
27 preceding and subsequent paragraphs as if fully set forth here verbatim.

1 872. The Pennsylvania Plaintiffs bring this action on behalf of themselves the
2 Pennsylvania Class and the Pennsylvania Subclass.

3 873. Purina owed a duty of care to the Pennsylvania Plaintiffs, the Pennsylvania
4 Class and the Pennsylvania Subclass to provide pet food that was safe for consumption by
5 dogs, free from toxins with harmful effects.

6 874. Purina breached this duty by selling Beneful, which contained Industrial Grade
7 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, without
8 adequate quality control and testing; without using proper manufacturing and production
9 practices; without properly investigating reports of pet deaths and illnesses following
10 consumption of Beneful; and without adequately warning the Pennsylvania Plaintiffs, the
11 Pennsylvania Class and the Pennsylvania Subclass of the dangers on Beneful's packaging.
12 Such conduct by Purina was negligent in that Purina failed to act as an ordinarily prudent and
13 reasonable person would have acted under the same or similar circumstances.

14 875. Purina should have known that Beneful posed a risk of harm to dogs; that
15 purchasers of Beneful, including the Pennsylvania Plaintiffs, the Pennsylvania Class and the
16 Pennsylvania Subclass, would not recognize the risk; and that consumption of Beneful by dogs
17 would foreseeably result in injury and death to those dogs, constituting property damage to the
18 Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass beyond and in
19 addition to damage from buying the worthless Beneful.

20 876. As a proximate result of Purina's negligent acts alleged herein, the Pennsylvania
21 Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass suffered injury to property,
22 specifically in the illness and deaths of their dogs and the expenses incurred therewith.

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COUNT 91**Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class
and the Pennsylvania Subclass
(Strict Product Liability)**

877. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

878. The Pennsylvania Plaintiffs bring this action on behalf of themselves the Pennsylvania Class and the Pennsylvania Subclass.

879. Purina designed, manufactured, distributed and sold Beneful, which was unsafe because it contained toxins and had other harmful effects as alleged, *supra*.

880. The existence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful was, at all times material hereto, an unreasonably dangerous defect and/or condition. The failure of Purina to warn on its package of the dangerousness of Beneful also constituted an unreasonably dangerous defect and/or condition.

881. These unreasonably dangerous defects and/or conditions existed at the time Beneful left Purina's control.

882. Beneful came in sealed packages, and it and its packaging did not change from the time it left Purina's possession through the time it arrived in stores to be sold to consumers and consumers purchased and took possession of it.

883. The unreasonably dangerous defects and/or conditions of Beneful proximately caused injury and death to dogs, constituting property damage to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass beyond and in addition to the damage caused by purchasing the worthless Beneful.

884. Accordingly, Purina is strictly liable for the damages caused to the Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass by the unreasonably

1 dangerous Beneful, specifically the illness and deaths of their dogs and expenses incurred
2 therewith.

3 **COUNT 92**

4 **Asserted as to the Pennsylvania Plaintiffs, the Pennsylvania Class
and the Pennsylvania Subclass**

5 **(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

6 885. The Pennsylvania Plaintiffs incorporate herein the allegations of all of the
7 preceding and subsequent paragraphs as if fully set forth herein verbatim.

8 886. The Pennsylvania Plaintiffs bring this action on behalf of themselves the
9 Pennsylvania Class and the Pennsylvania Subclass.

10 887. The Pennsylvania Plaintiffs, the Pennsylvania Class members and the
11 Pennsylvania Subclass conferred a benefit on Purina in the form of the gross revenues Purina
12 derived from the money they paid to purchase Beneful.

13 888. Purina had an appreciation or knowledge of the benefit conferred on it by the
14 Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania Subclass members.

15 889. Purina accepted and retained the benefit in the amount of the revenues it earned
16 from sales of Beneful to the Pennsylvania Plaintiffs, the Pennsylvania Class and the
17 Pennsylvania Subclass members.

18 890. Purina has thereby profited by retaining the benefit under circumstances which
19 would make it unjust for Purina to be permitted to retain the benefit.

20 891. The Pennsylvania Plaintiffs, the Pennsylvania Class and the Pennsylvania
21 Subclass are entitled to restitution of the entire amount Purina received from Purina's sales of
22 Beneful to them.

1 **N. TEXAS CAUSES OF ACTION**

2 **COUNT 93**

3 **Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class
and the Texas Subclass**

4 **(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et. seq.* (“MMWA”))**

5 892. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
6 and subsequent paragraphs as if fully set forth here verbatim.

7 893. The Texas Plaintiffs bring this claim on behalf of themselves the Texas Class
8 and the Texas Subclass.

9 894. At all times relevant hereto, there was in full force and effect the Magnuson-
10 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

11 895. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

12 896. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

13 897. The Texas Plaintiffs, the members of the Texas Class and the Texas Subclass are
14 “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers because they are persons
15 entitled under applicable state law to enforce against the warrantor the obligations of its implied
16 warranty.

17 898. Pursuant to 15 U.S.C. § 2310(e), the Texas Plaintiffs, the members of the Texas
18 Class and the Texas Subclass are entitled to bring this class action and are not required to give
19 Purina notice and an opportunity to cure until such time as the Court determines the
20 representative capacity of the Texas Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil
21 Procedure. However, Texas Plaintiff Pena already gave the required notice on behalf of herself
22 the Texas Class and the Texas Subclass by letter dated May 11, 2015.

23 899. In connection with its sale of Beneful, Purina gave an implied warranty as
24 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
25 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
26 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
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1 contract description as dog food, (c) was adequately contained, packaged and labeled as the
2 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
3 container and label. Tex. Bus. Com. Code § 2.314(b)(1), (3), (5) and (6)

4 900. Purina is liable to the Texas Plaintiffs, the Texas Class and the Texas Subclass
5 pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of
6 merchantability.

7 901. Purina initially breached the implied warranty of merchantability as to the Texas
8 Plaintiffs, the members of the Texas Class and the Texas Subclass because Beneful was not fit
9 for the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
10 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
11 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
12 fact, Beneful has caused injury and death to thousands of dogs.

13 902. Purina further breached its implied warranty of merchantability to the Texas
14 Plaintiffs, the members of the Texas Class and the Texas Subclass because Beneful would not
15 pass without objection in the trade under its contract description as dog food, as it contained
16 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
17 Arsenic.

18 903. Purina further breached its implied warranty of merchantability to the Texas
19 Plaintiffs, the members of the Texas Class and the Texas Subclass because Beneful was not
20 adequately contained, packaged, and labeled. The directions and labeling that accompanied the
21 Beneful dog food did not warn the Texas Plaintiffs, the members of the Texas Class and the
22 Texas Subclass of the dangers of feeding Beneful to their dogs.

23 904. Purina finally breached its implied warranty of merchantability to the Texas
24 Plaintiffs, the members of the Texas Class and the Texas Subclass because Beneful did not
25 conform to the promises and affirmations of fact set forth on its container and label, as
26 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
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1 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
 2 satisfaction was not guaranteed.

3 905. Pursuant to 15 U.S.C. § 2310(d)(1), the Texas Plaintiffs, the members of the
 4 Texas Class and the Texas Subclass are entitled to recover the following damages proximately
 5 caused to them by Purina’s breach of the implied warranty of merchantability: (1) the
 6 difference in value between the Beneful as warranted (the full purchase price) and the Beneful
 7 as actually delivered (\$0.00, because consumers would not have paid anything for it had they
 8 known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (2) the
 9 veterinarian bills caused by consumption of Beneful; (3) for those whose pets died from eating
 10 Beneful, the market value of the dogs; and (4) for those whose dogs died from eating Beneful,
 11 the cost of disposing of the remains. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Texas
 12 Plaintiffs, the members of the Texas Class and the Texas Subclass are entitled to recover a sum
 13 equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual
 14 time expended) determined by the Court to have been reasonably incurred by the Texas
 15 Plaintiffs, the members of the Texas Class and the Texas Subclass in connection with the
 16 commencement and prosecution of this action.

17 **COUNT 94**

18 **Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class and the Texas Subclass**

19 **(Breach of Express Warranty, Tex. Bus. & Com. Code § 2.313)**

20 906. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
 21 and subsequent paragraphs as if fully set forth here verbatim.

22 907. The Texas Plaintiffs bring this claim on behalf of themselves the Texas Class
 23 and the Texas Subclass.

24 908. Purina constituted both a “merchant” and a “seller,” as those terms are defined
 25 in Tex. Bus & Com. Code §§ 2.103 & 2.104, in connection with its sale of Beneful to the Texas
 26 Plaintiffs, the Texas Class and the Texas Subclass. Further, the Texas Plaintiffs, the members
 27

1 of the Texas Class and the Texas Subclass constituted “buyers,” as that term is defined in Tex.
2 Bus. & Com. Code § 2.103. Beneful, itself, constituted “goods,” as that term is defined in Tex.
3 Bus. & Com. Code § 2.105.

4 909. The statements on Purina’s packaging for Beneful created express warranties,
5 including that Beneful was safe for consumption by pets, under both common law and Tex.
6 Bus. Com. Code § 2.313. Said statements include, but are not limited to, Beneful dog food
7 being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that
8 customers’ satisfaction would be guaranteed.

9 910. The statements regarding Beneful described in detail above constituted
10 affirmations of fact and promises relating to Beneful that became part of the basis for the
11 bargain for the purchase of Beneful and created an express warranty that Beneful would
12 conform to those affirmations of fact and promises.

13 911. Likewise, the statements as described in detail above constituted descriptions of
14 Beneful that became part of the basis of the bargain for the purchase of Beneful and created an
15 express warranty that Beneful would conform to those descriptions.

16 912. Beneful contained Industrial Grade Glycols, which are not approved for use in
17 food, Mycotoxins, Lead, or Arsenic, constituting a breach of these express warranties.

18 913. The Texas Plaintiffs, the members of the Texas Class and the Texas Subclass
19 were injured as a proximate result of Purina’s aforementioned breaches as follows: (a) in the
20 amount of the difference in value between the value of the Beneful as warranted (its full
21 purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have
22 paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead,
23 or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c)
24 for those whose dogs died from eating Beneful, the market value of those dogs; and (d) for
25 those whose dogs died from eating Beneful, the cost of disposing of their remains.

914. Within a reasonable time after their discovery of Purina's breaches, the Texas Plaintiffs gave notice of the breaches of the express warranties on behalf of herself and the Texas Class. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not necessary for the Texas Plaintiffs, the Texas Class and the Texas Subclass members to give Purina notice of its breaches of the express warranties because Purina had actual notice of its breaches of warranty as to the Texas Plaintiffs, the Texas Class and the Texas Subclass.

COUNT 95

**Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class
and the Texas Subclass**

(Breach of the Implied Warranty of Merchantability, Tex. Bus. & Com. Code § 2.314)

915. The Texas Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

916. The Texas Plaintiff brings this claim on behalf of herself the Texas Class and the Texas Subclass.

917. Purina is a “seller” and “merchant” as to Beneful within the meaning of Tex. Bus. & Com. Code §§ 2.103 & 2.104. Purina designed, manufactured and sold Beneful, which constitutes “goods” within the meaning of Tex. Bus. & Com. Code § 2.105. The Texas Plaintiff, the members of the Texas Class and the Texas Subclass constituted “buyers” within the meaning of Tex. Bus. & Com. Code § 2.103. Consequently, pursuant to Tex. Bus. & Com. Code § 2.314(b)(1), (3), (5) & (6), Purina impliedly warranted that Beneful was merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food, (b) it could pass without objection in the trade under its contract description as dog food, (c) was adequately contained, packaged, and labeled as the agreements required, and (d) it conformed to the promises and affirmations of fact set forth on its container and labels.

918. Purina initially breached the implied warranty of merchantability as to the Texas Plaintiff, the members of the Texas Class and the Texas Subclass because Beneful was not fit

1 for the ordinary purposes for which it is used—a safe, healthy dog food. Specifically, Beneful
2 contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead,
3 or Arsenic, which made it unfit for its ordinary purpose of providing safe, healthy dog food. In
4 fact, Beneful has caused injury and death to thousands of dogs.

5 919. Purina further breached its implied warranty of merchantability to the Texas
6 Plaintiff, the members of the Texas Class and the Texas Subclass because Beneful would not
7 pass without objection in the trade under its contract description as dog food, as it contained
8 Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or
9 Arsenic.

10 920. Purina further breached its implied warranty of merchantability to the Texas
11 Plaintiff, the members of the Texas Class and the Texas Subclass because Beneful was not
12 adequately contained, packaged, and labeled. The directions and labeling that accompanied
13 Beneful did not warn the Texas Plaintiff, the members of the Texas Class and the Texas
14 Subclass of the dangers of feeding Beneful to their dogs.

15 921. Purina finally breached its implied warranty of merchantability to the Texas
16 Plaintiffs, the members of the Texas Class and the Texas Subclass because Beneful did not
17 conform to the promises and affirmations of fact set forth on its container and label, as
18 described above. Specifically, Beneful did not constitute safe, healthy food, was not “healthy,”
19 did not offer “great nutrition” to dogs, did not promote “healthy growth,” and customers’
20 satisfaction was not guaranteed.

21 922. The Texas Plaintiff, the members of the Texas Class and the Texas Subclass
22 were injured as a proximate result of Purina’s aforementioned breaches as follows: (a) in the
23 amount of the difference in value between the value of the Beneful as warranted (its full
24 purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have
25 paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead,
26 or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c)
27

1 for those whose dogs died from eating Beneful, the market value of those dogs; and (d) for
2 those whose dogs died from eating Beneful, the cost of disposing of their remains.

3 923. Within a reasonable time after their discovery of Purina's breaches, the Texas
4 Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of
5 themselves the Texas Class and the Texas Subclass. Alternatively, this pleading constitutes a
6 sufficient notice of Purina's breaches of the implied warranty of merchantability.
7 Alternatively, it was not necessary for the Texas Plaintiffs, the Texas Class and the Texas
8 Subclass members to give Purina notice of its breaches of warranty, because Purina had actual
9 notice of its breaches of warranty as to the Texas Plaintiffs, the Texas Class and the Texas
10 Subclass.

11 **COUNT 96**

12 **Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class and the Texas Subclass**

13 **(Violation of Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"))**

14 924. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
15 and subsequent paragraphs as if fully set forth here verbatim.

16 925. The Texas Plaintiffs bring this claim on behalf of herself the Texas Class and the
17 Texas Subclass.

18 926. The Texas Plaintiffs, the members of the Texas Class and the Texas Subclass are
19 "consumers" as defined in Tex. Bus. & Com. Code § 17.45(4).

20 927. Beneful, itself, constituted "goods," as that term is defined in Tex. Bus. & Com.
21 Code § 17.45(1).

22 928. Purina violated DTPA § 17.50(a)(2), because Purina breached both express and
23 implied warranties relating to Beneful, as describe in detail, *supra*.

24 929. Purina's violations of DTPA § 17.50(a)(2) were the producing cause of actual
25 economic damages to the Texas Plaintiffs, the members of the Texas Class and the Texas
26 Subclass equal to: (a) the amount the Texas Plaintiffs, the members of the Texas Class and the
27

1 Texas Subclass paid for the worthless Beneful: the difference in value between the value of
2 Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted
3 and delivered (\$0, because consumers would not have paid anything for it had they known it
4 contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) their veterinarian bills
5 incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from eating
6 Beneful, the market value of their dogs; and (4) for those whose dogs died from eating
7 Beneful, the cost of disposing of their remains, which they seek to recover from Purina
8 pursuant to DTPA § 17.50(b)(1).

9 930. Alternatively, the Texas Plaintiffs, the members of the Texas Class and the
10 Texas Subclass seek disgorgement and/or restitution of the gross revenue derived by Purina
11 from its sale of Beneful to them, along with any other equitable relief to which they are
12 entitled, pursuant to DTPA § 17.50(b)(3). In addition to their actual economic damages,
13 pursuant to DTPA § 17.50(d), the Texas Plaintiffs, the members of the Texas Class and the
14 Texas Subclass are entitled to recover their reasonable and necessary attorneys' fees and court
15 costs.

16 931. Purina committed the conduct in question knowingly or intentionally, pursuant
17 to DTPA § 17.50(b), as evidenced by the fact that despite knowledge of the deaths of thousands
18 of dogs as the result of eating Beneful and that it had breached its express and implied
19 warranties relating to Beneful, Purina continued to market and sell Beneful, all the while
20 omitting that Beneful contained Industrial Grade Glycols, which are not approved for use in
21 food, Mycotoxins, Lead, or Arsenic. Because Purina's breaches of its express and implied
22 warranties relating to Beneful were made knowingly or intentionally, the Texas Plaintiffs, the
23 Texas Class and the Texas Subclass are entitled to recover additional damages of not more than
24 three times the amount of their economic damages.

25 932. For those members of the Texas Class and the Texas Subclass whose dogs were
26 injured or killed by consumption of Beneful more than two years before the filing of the
27

1 Original Complaint in this action, the statute of limitations has not run on their DTPA causes of
2 action pursuant to Tex. Bus. & Com. Code § 17.565 because they did not discover, and should
3 not have discovered in the exercise of reasonable diligence, Purina's breaches of warranties
4 until within two years prior to the filing of the Original Complaint in this action.

5 **COUNT 97**

6 **Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class**
7 **and the Texas Subclass**
8 **(Negligence)**

9 933. The Texas Plaintiffs incorporate herein the allegations of all of the preceding
10 and subsequent paragraphs as if fully set forth here verbatim.

11 934. The Texas Plaintiffs bring this claim on behalf of themselves the Texas Class
12 and the Texas Subclass.

13 935. Purina owed a duty of reasonable care to the Texas Plaintiffs, the members of
14 the Texas Class and the Texas Subclass to provide dog food that was safe for consumption by
15 dogs, free from excessive amounts of toxins with harmful effects.

16 936. Purina breached this duty by designing, manufacturing, marketing and selling
17 Beneful, which contained Industrial Grade Glycols, which are not approved for use in food,
18 Mycotoxins, Lead, or Arsenic, without adequate quality control and testing; without using
19 proper manufacturing and production practices; without properly investigating reports of pet
20 deaths and illnesses following consumption of Beneful; and without adequately warning the
21 Texas Plaintiffs, the members of the Texas Class and the Texas Subclass of Beneful's dangers
22 on its packaging. Such conduct by Purina was negligent because it did not reflect the level of
23 care that an ordinarily prudent and reasonable person in Purina's place would have given under
24 the same or similar circumstances.

25 937. Purina should have known that Beneful posed a risk of harm to dogs; that
26 purchasers of Beneful, including the Texas Plaintiffs, the members of the Texas Class and the
27 Texas Subclass, would not recognize the risk; and that consumption of Beneful by pets would

foreseeably result in their injury and death. Such injury and death to the dogs constituted property damage to the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass beyond and in addition to their damage from purchasing the worthless Beneful.

938. As a proximate result of Purina's negligent acts alleged herein, the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass suffered injury to property, specifically the illness and deaths of their dogs, and the expenses incurred therewith.

COUNT 98

Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class and the Texas Subclass

(Strict Products Liability – Section 402A of the Restatement (Second) of Torts)

939. The Texas Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

940. The Texas Plaintiffs bring this claim on behalf of themselves the Texas Class and the Texas Subclass.

941. Purina designed, manufactured and sold Beneful, which contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic as alleged, *supra*. The presence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic in Beneful, at all times material hereto, constituted an unreasonably dangerous defect and/or condition.

942. Beneful was unreasonably dangerous because of defects in marketing, design and manufacturing.

943. There was a defect in the marketing of Beneful which made it unreasonably dangerous because Purina failed to warn the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass, on its packaging or otherwise, of the potential harm to their dogs from eating Beneful.

944. Beneful was defectively designed because it contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, there were substitute

1 ingredients available for Beneful that would meet the same needs and not be unsafe or
2 unreasonably expensive, Purina had the ability to eliminate the unsafe character of Beneful
3 without seriously impairing its usefulness or significantly increasing its costs, it was not
4 anticipated that purchasers of Beneful would be aware of the dangers inherent in the use of the
5 product, and the expectations of the ordinary consumer were that dog food manufactured by
6 Purina would be safe for dogs.

7 945. Alternatively, Beneful was defectively manufactured because it contained
8 excessive amounts of toxins or other ingredients that are harmful and deadly to dogs that
9 deviated in terms of quality from the specifications or planned output in a manner that rendered
10 it unreasonably dangerous beyond the expectations of ordinary consumers.

11 946. These unreasonably dangerous defects in the marketing, design and manufacture
12 of Beneful existed at the time the Beneful left Purina's control.

13 947. Beneful came in sealed packages, and it did not change from the time it left
14 Purina's possession, through the time it arrived in stores to be sold to consumers and consumers
15 bought and took possession of it.

16 948. The unreasonably dangerous defects and/or conditions of Beneful proximately
17 caused injury and death to dogs, and related expenses, constituting property damage to the
18 Texas Plaintiffs, the members of the Texas Class and the Texas Subclass beyond and in
19 addition to their damages from purchasing the worthless Beneful.

20 949. Accordingly, Purina is strictly liable for these damages caused to the Texas
21 Plaintiffs, the members of the Texas Class and the Texas Subclass by its unreasonably
22 dangerous product.

COUNT 99**Asserted Against Purina on Behalf of the Texas Plaintiffs, the Texas Class
and the Texas Subclass****(Assumpsit/Money Had and Received/Unjust Enrichment/Restitution)**

950. The Texas Plaintiffs incorporate herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

951. The Texas Plaintiffs bring this claim on behalf of herself the Texas Class and the Texas Subclass.

952. The Texas Plaintiffs, the members of the Texas Class and the Texas Subclass purchased Beneful, which was defective, not merchantable, and unreasonably dangerous and therefore had no value to them.

953. Purina holds money, namely the gross revenues it derived from its sale of Beneful to the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass, which in equity and good conscience belong to the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass.

954. Based upon money had and received, the Texas Plaintiffs, the members of the Texas Class and the Texas Subclass are entitled to recover the full amount of all gross revenue derived by Purina from the sale of Beneful to them.

O. WASHINGTON CAUSES OF ACTION**COUNT 100****Asserted as to the Washington Plaintiff, the Washington Class
and the Washington Subclass****(Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et. seq. ("MMWA"))**

955. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

956. The Washington Plaintiff brings this claim on behalf of herself the Washington Class and the Washington Subclass.

1 957. At all times relevant hereto, there was in full force and effect the Magnuson-
2 Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (the “MMWA”).

3 958. Beneful is a consumer product as defined in 15 U.S.C. § 2301(1).

4 959. Purina is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) and (5).

5 960. The Washington Plaintiff, the members of the Washington Class and the
6 Washington Subclass are “consumers” as defined in 15 U.S.C. § 2301(3). They are consumers
7 because they are persons entitled under applicable state law to enforce against the warrantor the
8 obligations of its implied warranty.

9 961. Pursuant to 15 U.S.C. § 2310(e), the Washington Plaintiff, the members of the
10 Washington Class and the Washington Subclass are entitled to bring this class action and are
11 not required to give Purina notice and an opportunity to cure until such time as the Court
12 determines the representative capacity of the Washington Plaintiff pursuant to Rule 23 of the
13 Federal Rules of Civil Procedure. However, Washington Plaintiff Kimball already gave the
14 required notice on behalf of herself the Washington Class and the Washington Subclass by
15 letter dated May 20, 2015.

16 962. In connection with its sale of Beneful, Purina gave an implied warranty as
17 defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of
18 the implied warranty of merchantability, Purina warranted that Beneful: (a) was fit for its
19 ordinary purpose as safe dog food, (b) would pass without objection in the trade under its
20 contract description as dog food, (c) was adequately contained, packaged and labeled as the
21 agreements required, and (d) conformed to the promises and affirmations of fact set forth on its
22 container and label. Wash. Rev. Code § 62A.2–314.

23 963. Purina is liable to the Washington Plaintiff, the Washington Class and the
24 Washington Subclass pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied
25 warranty of merchantability.
26
27

1 964. Purina initially breached the implied warranty of merchantability as to the
2 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
3 because Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog
4 food. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use
5 in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of
6 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
7 dogs.

8 965. Purina further breached its implied warranty of merchantability to the
9 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
10 because Beneful would not pass without objection in the trade under its contract description as
11 dog food, as it contained Industrial Grade Glycols, which are not approved for use in food,
12 Mycotoxins, Lead, or Arsenic.

13 966. Purina further breached its implied warranty of merchantability to the
14 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
15 because Beneful was not adequately contained, packaged, and labeled. The directions and
16 labeling that accompanied the Beneful dog food did not warn the Washington Plaintiff, the
17 members of the Washington Class and the Washington Subclass of the dangers of feeding
18 Beneful to their dogs.

19 967. Purina finally breached its implied warranty of merchantability to the
20 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
21 because Beneful did not conform to the promises and affirmations of fact set forth on its
22 container and label, as described above. Specifically, Beneful did not constitute safe, healthy
23 food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy
24 growth,” and customers’ satisfaction was not guaranteed.

25 968. Pursuant to 15 U.S.C. § 2310(d)(1), the Washington Plaintiff, the members of
26 the Washington Class and the Washington Subclass are entitled to recover the following
27

1 damages proximately caused to them by Purina's breach of the implied warranty of
 2 merchantability: (1) the difference in value between the Beneful as warranted (the full purchase
 3 price) and the Beneful as actually delivered (\$0.00, because consumers would not have paid
 4 anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or
 5 Arsenic); (2) the veterinarian bills caused by consumption of Beneful; (3) for those whose pets
 6 died from eating Beneful, the market value of the dogs; and (4) for those whose dogs died from
 7 eating Beneful, the cost of disposing of the remains.

8 969. In addition, pursuant to 15 U.S.C. § 2310(d)(2), the Washington Plaintiff, the
 9 members of the Washington Class and the Washington Subclass are entitled to recover a sum
 10 equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual
 11 time expended) determined by the Court to have been reasonably incurred by the Washington
 12 Plaintiff, the members of the Washington Class and the Washington Subclass in connection
 13 with the commencement and prosecution of this action.

14 **COUNT 101**

15 **Asserted as to the Washington Plaintiff, the Washington Class
 16 and the Washington Subclass**

17 **(Breach of Express Warranty - Wash. Rev. Code § 62A.2-313)**

18 970. The Washington Plaintiff incorporates herein the allegations of all of the
 19 preceding and subsequent paragraphs as if fully set forth here verbatim.

20 971. The Washington Plaintiff brings this claim on behalf of herself the Washington
 21 Class and the Washington Subclass.

22 972. Purina constituted both a "merchant" and a "seller," as those terms are defined
 23 in Wash. Rev. Code §§ 62A.2-104 and 62A.2-103, in connection with its sale of Beneful to the
 24 Washington Plaintiff, the Washington Class and the Washington Subclass. Further, the
 25 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
 26 constituted "buyers," as that term is defined in Wash. Rev. Code § 62A.2-103. Beneful, itself,
 27 constituted "goods," as that term is defined in Wash. Rev. Code § 62A.2-105.

1 973. The statements on Purina’s packaging for Beneful created express warranties,
2 including that Beneful was safe for consumption by pets, under both common law and Wash.
3 Rev. Code § 62A.2–313. Said statements include, but are not limited to, Beneful dog food
4 being “healthy,” offering “great nutrition” to dogs, promoting “healthy growth” and that
5 customers’ satisfaction would be guaranteed.

6 974. The statements regarding Beneful described in detail above constituted
7 affirmations of fact and promises relating to Beneful that became part of the basis for the
8 bargain for the purchase of Beneful and created an express warranty that Beneful would
9 conform to those affirmations of fact and promises.

10 975. Likewise, the statements as described in detail above constituted descriptions of
11 Beneful that became part of the basis of the bargain for the purchase of Beneful and created an
12 express warranty that Beneful would conform to those descriptions.

13 976. Beneful was not safe for pets to consume and caused pets to become ill and/or
14 die. The unsafe nature of Beneful constituted a breach of these express warranties.

15 977. The Washington Plaintiff, the members of the Washington Class and the
16 Washington Subclass were injured as a proximate result of Purina’s aforementioned breaches
17 as follows: (a) in the amount of the difference in value between the value of the Beneful as
18 warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because
19 consumers would not have paid anything for it had they known it contained Industrial Grade
20 Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their
21 pets consuming Beneful; (c) for those whose dogs died from consuming Beneful, the market
22 value of those dogs; and (d) for those whose dogs died from consuming Beneful, the cost of
23 disposing of their remains.

24 978. Within a reasonable time after her discovery of Purina’s breaches, the
25 Washington Plaintiff gave notice of the breaches of the express warranties on behalf of herself
26 the Washington Class and the Washington Subclass. Alternatively, this pleading constitutes a
27

1 sufficient notice of Purina's breaches of the express warranties. Alternatively, it was not
 2 necessary for the Washington Plaintiff, the Washington Class and the Washington Subclass
 3 members to give Purina notice of its breaches of the express warranties as to them because
 4 Purina already had actual notice of those breaches.

5 **COUNT 102**

6 **Asserted as to the Washington Plaintiff, the Washington Class
 and the Washington Subclass**

7 **(Breach of the Implied Warranty of Merchantability - Wash. Rev. Code § 62A.2-314)**

8 979. The Washington Plaintiff incorporates herein the allegations of all of the
 9 preceding and subsequent paragraphs as if fully set forth here verbatim.

10 980. The Washington Plaintiff brings this claim on behalf of herself the Washington
 11 Class and the Washington Subclass.

12 981. Purina is a "seller" and "merchant" as to Beneful within the meaning of Wash.
 13 Rev. Code §§ 62A.2-103 and 62A.2-104. Purina designed, manufactured and sold Beneful,
 14 which constitutes "goods" within the meaning of Wash. Rev. Code § 62A.2-105. The
 15 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
 16 constituted "buyers" within the meaning of Wash. Rev. Code § 62A.2-103. Consequently,
 17 pursuant to Wash. Rev. Code § 62A.2-314, Purina impliedly warranted that Beneful was
 18 merchantable, including that it: (a) was fit for its ordinary purposes as safe, healthy dog food,
 19 (b) could pass without objection in the trade under its contract description as dog food, (c) was
 20 adequately contained, packaged, and labeled as the agreements required, and (d) conformed to
 21 the promises and affirmations of fact set forth on its container and labels.

22 982. Beneful was sold in sealed packaging, and the defects existed when it left
 23 Purina's control.

24 983. When Purina designed, manufactured, distributed and sold Beneful, it knew the
 25 purpose for which Beneful was intended; *i.e.*, that it would be consumed by dogs.
 26
 27

1 984. Purina initially breached the implied warranty of merchantability as to the
2 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
3 because Beneful was not fit for the ordinary purposes for which it is used—a safe, healthy dog
4 food. Specifically, Beneful contained Industrial Grade Glycols, which are not approved for use
5 in food, Mycotoxins, Lead, or Arsenic, which made it unfit for its ordinary purpose of
6 providing safe, healthy dog food. In fact, Beneful has caused injury and death to thousands of
7 dogs.

8 985. Purina further breached its implied warranty of merchantability to the
9 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
10 because Beneful would not pass without objection in the trade under its contract description as
11 dog food, as it contained Industrial Grade Glycols, which are not approved for use in food,
12 Mycotoxins, Lead, or Arsenic.

13 986. Purina further breached its implied warranty of merchantability to the
14 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
15 because Beneful was not adequately contained, packaged, and labeled. The directions and
16 labeling that accompanied Beneful did not warn the Washington Plaintiff, the members of the
17 Washington Class and the Washington Subclass of the dangers of feeding Beneful to their
18 dogs.

19 987. Purina finally breached its implied warranty of merchantability to the
20 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
21 because Beneful did not conform to the promises and affirmations of fact set forth on its
22 container and label, as described above. Specifically, Beneful did not constitute safe, healthy
23 food, was not “healthy,” did not offer “great nutrition” to dogs, did not promote “healthy
24 growth,” and customers’ satisfaction was not guaranteed.

25 988. The Washington Plaintiff, the members of the Washington Class and the
26 Washington Subclass were injured as a proximate result of Purina’s aforementioned breaches
27

as follows: (a) in the amount of the difference in value between the value of the Beneful as warranted (its full purchase prices) and the Beneful as actually delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) the veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from consuming Beneful, the market value of those dogs; (d) for those whose dogs died from consuming Beneful, the cost of disposing of their remains; and (e) other economic losses, including the increased risk of health problems in their pets.

989. Within a reasonable time after her discovery of Purina's breaches, the Washington Plaintiff gave notice of the breaches of the implied warranty of merchantability on behalf of herself the Washington Class and the Washington Subclass. Alternatively, this pleading constitutes a sufficient notice of Purina's breaches of the implied warranty of merchantability. Alternatively, it was not necessary for the Washington Plaintiff to give Purina already notice of its breaches of the implied warranty of merchantability as to her the Washington Class and the Washington Subclass because Purina had actual notice of such breaches.

COUNT 103

**Asserted as to the Washington Plaintiff, the Washington Class and
the Washington Subclass**

**(Violation of the Washington Consumer Protection Act, Unfair Business Practices, Wash.
Rev. Code § 19.86.010 et seq.)**

990. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

991. The Washington Plaintiff brings this claim on behalf of herself the Washington Class and the Washington Subclass.

992. The Washington Consumer Protection Act ("WCPA") declares unlawful (i) an unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) with a public interest impact, and (iv) which causes injury to Plaintiffs.

1 993. Purina is a “person” within the meaning of the WCPA, Wash. Rev. Code §
2 19.86010(1), and conducts “trade” and “commerce” within the meaning of the Washington
3 Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

4 994. The Washington Plaintiff, the Washington Class and the Washington Subclass
5 members are “persons” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

6 995. At all relevant times, Purina engaged in unfair acts or practices in the conduct of
7 its business by promising and affirming on its container and label that Beneful was “healthy,”
8 offered “great nutrition” to dogs, and promoted “healthy growth” when, in actuality, Purina
9 omitted that Beneful contained Industrial Grade Glycols, which are not approved for use in
10 food, Mycotoxins, Lead, or Arsenic. Purina further engaged in unfair acts or practices in the
11 conduct of its business when it continued to represent the health benefits of Beneful despite
12 being aware of numerous complaints from users of Beneful that their dogs had become ill or
13 died after consuming it.

14 996. The acts and practices described above are unfair because these acts or practices
15 (1) have caused substantial financial injury to the Washington Plaintiff, the Washington Class
16 and the Washington Subclass members; (2) are not outweighed by any countervailing benefits
17 to consumers or competitors; and (3) are not reasonably avoidable by consumers.

18 997. Purina’s unfair practices have occurred in its trade or business and were and are
19 capable of injuring a substantial portion of the public. As such, Purina’s general course of
20 conduct as alleged herein is injurious to the public interest, and the acts complained of herein
21 are ongoing and/or have a substantial likelihood of being repeated.

22 998. As a direct and proximate result of Purina’s unfair acts or practices, the
23 Washington Plaintiff, the Washington Class and the Washington Subclass members suffered
24 injury in fact. As a result of Purina’s unfair practices, Plaintiff and Class members suffered
25 injury in fact and lost money.

999. Plaintiff the Washington Class and the Washington Subclass are therefore entitled to an order enjoining the conduct complained herein; actual damages to the Washington Plaintiff, the members of the Washington Class and the Washington Subclass equal to: (a) the amount the Washington Plaintiff, the members of the Washington Class and the Washington Subclass paid for the worthless Beneful: the difference in value between the value of Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) their veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from eating Beneful, the market value of their dogs; and (d) for those whose dogs died from eating Beneful, the cost of disposing of their remains; treble damages pursuant to Wash. Rev. Code § 19.86.090; costs of suit, including a reasonable attorney's fee; and such further relief as the Court may deem proper.

1000. The Washington Plaintiff, the Washington Class and the Washington Subclass are also entitled to equitable relief as the Court deems appropriate, including, but not limited to, disgorgement, for the benefit of the Class members, or all or part of the ill-gotten profits Purina received from the sale of Beneful.

COUNT 104

Asserted as to the Washington Plaintiff, the Washington Class and the Washington Subclass

(Violation of the Washington Consumer Protection Act, Deceptive Business Practices, Wash. Rev. Code § 19.86.010 et seq.)

1001. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1002. The Washington Plaintiff brings this claim on behalf of herself the Washington Class and the Washington Subclass.

1 1003. The Washington Consumer Protection Act (“WCPA”) declares unlawful (i) an
2 unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) with a public
3 interest impact, and (iv) which causes injury to Plaintiffs.

4 1004. Purina is a “person” within the meaning of the WCPA, Wash. Rev. Code §
5 19.86010(1), and conducts “trade” and “commerce” within the meaning of the Washington
6 Consumer Protection Act, Wash. Rev. Code § 19.86.010(2).

7 1005. The Washington Plaintiff, the Washington Class and the Washington Subclass
8 members are “persons” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

9 1006. At all relevant times, Purina engaged in deceptive acts or practices in the
10 conduct of its business by promising and affirming on its container and label that Beneful was
11 “healthy,” offered “great nutrition” to dogs, and promoted “healthy growth” when, in actuality,
12 Purina omitted that Beneful contained Industrial Grade Glycols, which are not approved for use
13 in food, Mycotoxins, Lead, or Arsenic. Purina further engaged in deceptive acts or practices in
14 the conduct of its business when it continued to represent the health benefits of Beneful despite
15 being aware of numerous complaints from users of Beneful that their dogs had become ill or
16 died after consuming it.

17 1007. The numerous complaints that Purina concealed from the Washington Plaintiff,
18 the Washington Class and the Washington Subclass members are material in that a reasonable
19 consumer would not have purchased Beneful and subjected himself or herself to injury had he
20 or she known these facts.

21 1008. Purina’s deceptive practices have occurred in its trade or business and were and
22 are capable of deceiving a substantial portion of the public. As such, Purina’s general course of
23 conduct as alleged herein is injurious to the public interest, and the acts complained of herein
24 are ongoing and/or have a substantial likelihood of being repeated.

25 1009. As a direct and proximate result of Purina’s deceptive acts or practices, the
26 Washington Plaintiff, the Washington Class and the Washington Subclass members suffered
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injury in fact. As a result of Purina's deceptive practices, Plaintiff, Class and Subclass members were overcharged for the Beneful and thus lost money.

1010. Plaintiff, the Class and the Subclass are therefore entitled to an order enjoining the conduct complained herein; actual damages to the Washington Plaintiff, the members of the Washington Class and the Washington Subclass equal to: (a) the amount the Washington Plaintiff, the members of the Washington Class and the Washington Subclass paid for the worthless Beneful: the difference in value between the value of Beneful as represented (the full purchase prices) and the value of Beneful as actually accepted and delivered (\$0, because consumers would not have paid anything for it had they known it contained Industrial Grade Glycols, Mycotoxins, Lead, or Arsenic); (b) their veterinarian bills incurred as a result of their pets consuming Beneful; (c) for those whose dogs died from eating Beneful, the market value of their dogs; and (d) for those whose dogs died from eating Beneful, the cost of disposing of their remains; treble damages pursuant to Wash. Rev. Code § 19.86.090; costs of suit, including a reasonable attorney's fee; and such further relief as the Court may deem proper.

1011. The Washington Plaintiff, the Washington Class and the Washington Subclass are also entitled to equitable relief as the Court deems appropriate, including, but not limited to, disgorgement, for the benefit of the Class members, or all or part of the ill-gotten profits Purina received from the sale of Beneful.

COUNT 105

**Asserted as to the Washington Plaintiff, the Washington Class
and the Washington Subclass**

(Negligence - Washington Product Liability Act, Wash. Rev. Code § 7.72.030(1))

1012. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1013. The Washington Plaintiff brings this claim on behalf of herself the Washington Class and the Washington Subclass.

1 1014. Purina owed a duty of reasonable care to the Washington Plaintiff, the members
2 of the Washington Class and the Washington Subclass to provide dog food that was safe for
3 consumption by dogs, free from excessive amounts of toxins with harmful effects.

4 1015. Purina breached this duty by selling Beneful, which contained Industrial Grade
5 Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, without
6 adequate quality control and testing; without using proper manufacturing and production
7 practices; without properly investigating reports of pet deaths and illnesses following
8 consumption of Beneful; and without adequately warning the Washington Plaintiff, the
9 members of the Washington Class and the Washington Subclass of Beneful's dangers on its
10 packaging.

11 1016. Such conduct by Purina was negligent because it did not reflect the level of care
12 that an ordinarily prudent and reasonable person in Purina's place would have given under the
13 same or similar circumstances.

14 1017. Purina should have known that Beneful posed a risk of harm to dogs; that
15 purchasers of Beneful, including the Washington Plaintiff, the members of the Washington
16 Class and the Washington Subclass, would not recognize the risk; and that consumption of
17 Beneful by pets would foreseeably result in their injury and death. Such injury and death to the
18 dogs constituted property damage to the Washington Plaintiff, the members of the Washington
19 Class and the Washington Subclass beyond and in addition to their damage from purchasing the
20 worthless Beneful.

21 1018. As a proximate result of Purina's negligent acts alleged herein, the Washington
22 Plaintiff, the members of the Washington Class and the Washington Subclass suffered injury to
23 property, specifically the illness and deaths of their dogs, and the expenses incurred therewith.

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COUNT 106**Asserted as to the Washington Plaintiff, the Washington Class
and the Washington Subclass
(Strict Products Liability - Wash. Rev. Code § 7.72.030(2))**

1019. The Washington Plaintiff incorporates herein the allegations of all of the preceding and subsequent paragraphs as if fully set forth here verbatim.

1020. The Washington Plaintiff brings this claim on behalf of herself the Washington Class and the Washington Subclass.

1021. Purina designed, manufactured, distributed and sold Beneful, which contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic as alleged, *supra*. The presence of Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic and other harmful effects in Beneful, at all times material hereto, which would not reasonably have been expected by consumers, constituted an unreasonably dangerous defect and/or condition.

1022. Beneful was unreasonably dangerous because of defects in marketing, design and manufacturing, which reasonable consumers would not have expected.

1023. There was a defect in the marketing of Beneful which made it unreasonably dangerous because Purina failed to warn the Washington Plaintiff, the members of the Washington Class and the Washington Subclass, on its packaging or otherwise, of the potential harm to their dogs from eating Beneful, which warning reasonable consumers would have expected.

1024. Beneful was defectively designed because it contained Industrial Grade Glycols, which are not approved for use in food, Mycotoxins, Lead, or Arsenic, there were substitute ingredients available for Beneful that would meet the same needs and not be unsafe or unreasonably expensive, Purina had the ability to eliminate the unsafe character of Beneful without seriously impairing its usefulness or significantly increasing its costs, it was not anticipated that purchasers of Beneful would be aware of the dangers inherent in the use of the

1 product, and the expectations of the ordinary consumer were that dog food manufactured by
2 Purina would be safe for dogs.

3 1025. Alternatively, Beneful was defectively manufactured because it contained
4 excessive amounts of toxins or other ingredients that are harmful and deadly to dogs that
5 deviated in terms of quality from the specifications or planned output in a manner that rendered
6 it unreasonably dangerous and not within the expectations of reasonable consumers.

7 1026. These unreasonably dangerous defects in the marketing, design and manufacture
8 of Beneful existed at the time the Beneful left Purina's control.

9 1027. Beneful came in sealed packages, and it did not change from the time it left
10 Purina's possession, through the time it arrived in stores to be sold to consumers and consumers
11 bought and took possession of it.

12 1028. The unreasonably dangerous defects and/or conditions of Beneful proximately
13 caused injury and death to dogs, and related expenses, constituting property damage to the
14 Washington Plaintiff, the members of the Washington Class and the Washington Subclass
15 beyond and in addition to their damages from purchasing the worthless Beneful.

16 1029. Accordingly, Purina is strictly liable for these damages caused to the
17 Washington Plaintiff, the members of the Washington Class and the Washington Subclass by
18 its unreasonably dangerous product.

19 **COUNT 107**

20 **Asserted as to the Washington Plaintiff, the Washington Class
and the Washington Subclass**

21 **(Unjust Enrichment/Restitution/Assumpsit/Money Had and Received)**

22 1030. The Washington Plaintiff incorporates herein the allegations of all of the
23 preceding and subsequent paragraphs as if fully set forth here verbatim.

24 1031. The Washington Plaintiff brings this claim on behalf of herself the Washington
25 Class and the Washington Subclass.
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1032. The Washington Plaintiff, the members of the Washington Class and the Washington Subclass, at their expense, purchased Beneful, which was defective, not merchantable, and unreasonably dangerous and therefore had no value to them.

1033. The Washington Plaintiff, the members of the Washington Class and the Washington Subclass purchased Beneful designed, manufactured and marketed by Purina in various retail stores. Purina knowingly received and retained a benefit from the Washington Plaintiff, the Washington Class and the Washington Subclass members, the gross revenues resulting from their purchases. Purina is not justified in retaining these revenues because of the diminished value, inherent defects, adulterated state, misbranded content and general lack of merchantability of Beneful.

1034. Principles of fairness and equity demand that Purina disgorge the above-referenced revenues to the Washington Plaintiff and the Washington Class members.

PRAYER

WHEREFORE, Plaintiffs and the Classes request that the Court enter an order of judgment against Purina including the following:

1. Certification of the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and appointment of Plaintiffs as Class Representatives and their counsel of record as Class Counsel;

2. An order requiring Purina to pay Plaintiffs and other Class members an amount of actual, statutory, and punitive damages, and restitution in an amount to be determined at trial, and where allowed by law;

3. An order granting equitable relief in the form of restitution and/or disgorgement of all unlawful or illegal profits received by Purina as a result of the unlawful, unfair and/or deceptive conduct alleged herein;

4. An order granting Plaintiffs' reasonable costs and attorneys' fees; and

5. An order granting such other relief as may be just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial for all individual and Class claims so triable.

Dated: June 19, 2015.

Respectfully submitted,

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